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N. 2913

No. 14539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF

THE LOS ANGELES COUNTY PIONEER SOCIETY,

Debtor.

Memorandum of Historical Society of Southern California in Opposition to Motion to Reinstate Stay.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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THE LOS ANGELES COUNTY PIONEER SOCIETY,

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Memorandum of Historical Society of Southern California in Opposition to Motion to Reinstate Stay.

General Statement.

Appellant, Los Angeles County Pioneer Society, a California corporation organized for public charitable purposes,[1] commenced in the Superior Court at Los Angeles proceeding to dissolve and distribute its property among its members. The People of the State, by the Attorney General, filed complaint in intervention, and thereon judgment was rendered that all of Pioneer's property is dedicated to the public charitable trust stated in its articles, and that Pioneer had abused and abandoned the trust, was ousted and required to account as trustee. Historical Society of Southern California was appointed successor

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[1]*In the Matter of the Estate of Victor Dol, Deceased, Los Angeles County Pioneer Society, Respondent, v. Frank P. Flint, et al., Executors, Appellants* (1921), 186 Cal. 64.

trustee, and $95,243.54 trust funds, theretofore impounded, turned over to it.

The judgment also directed Pioneer, after accounting, to wind up its business, report to the court, and, on approval of the report, to proceed with the contemplated dissolution.

The judgment was affirmed May 5, 1953.[2]

June 29, 1954, Pioneer represented to the Superior Court that it would account as directed, and July 27th at 10 o'clock a.m. was fixed as the time for hearing the account.[3]

No account was filed; but, on July 26, 1954, Pioneer filed in the United States District Court Petition for Arrangement under Chapter XI of the Bankruptcy Act. Therein it withheld mention of its charitable status. It alleges that it is a "non-profit" corporation and is the beneficial owner of the $95,243.54 held by Historical Society of Southern California as trustee. It concurrently obtained *ex parte* orders from District Judge Harrison staying proceedings in the State Court and restraining Historical Society and the latter's bank depositary from making any disposition of the funds.

The stay was served on Superior Judge Pope at about 10 o'clock a.m. July 27, 1954, whereupon counsel for all parties called on Judge Harrison. The latter's attention was called to the decision of the California Supreme Court last above cited, and counsel for the State and Historical

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[2]*In re Los Angeles County Pioneer Society, a Corporation, in Process of Voluntary Dissolution; L. A. County Pioneer Society et al., Appellants, v. Historical Society of Southern California (a Corporation) et al., Respondents; The People, etc. Interveners and Respondents* (1953), 40 Cal. 2d 852; cert. den. 346 U. S. 888.

[3]Tr. 7-30-54, p. 27, lines 4-8.

Society asked that he vacate the stay and restraining orders.

Judge Harrison was engaged in a trial. He stated that the matter would be considered at his earliest opportunity.

Counsel were later informed that at Judge Harrison's request, Judge Mathes had agreed to hear the matter on July 28, 1954, at 2 p.m.

At that time, all parties being present in open court, the hearing was without objection proceeded with and concluded on July 30, 1954.[4]

July 28, 1954, the stay was vacated, and on July 30, 1954, all other orders were vacated and the petition was dismissed.[5]

Pioneer appeals, and, asserting that the vacation of the orders was without proceedings, without affidavits, without grounds and without specifications and summary, asks that they be reinstated.

Allegations of the Petitions for Arrangement, for Extension of Time to File Schedules, for Stay and for Restraining Orders.

The Petition for Arrangement alleges in substance:

That Pioneer is a "non-profit" corporation, and its purposes as stated in its articles are quoted;[6]

That it acquired real and personal property by testamentary and other gifts and, in 1947, its assets amounted to $95,263.67; and that said assets con-

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[4]Tr. 7-30-54, p. 5, line 15, to p. 7, line 5.

[5]Tr. 7-28-54, p. 37, line 23; Tr. 7-30-54, pp. 54 and 55.

[6]Pet. p. 1, line 22, *et seq.;* Pet. p. 2, lines 7-26.

sist of "stocks and bonds which the Historical Society has bought as trustee for * * * Pioneer * * * and which will be turned over to the trustee appointed by the court."[7]

That, having obtained declaratory judgment that it could do so, Pioneer resolved, and commenced proceedings, to dissolve and distribute its property among its members; that in the dissolution proceedings, following objection to the proposed distribution, "the funds were ordered impounded and later transferred to another society *as trustees for * * * Pioneer Society's funds*";[8]

That in "these proceedings" Pioneer became obligated for attorneys' and accountants' fees and other expenses; that it has no funds with which to pay these expenses or other debts as they mature, and "arrangement" is, therefore, necessary;[9]

That the resolution to dissolve was revoked January 21, 1953.[10]

The "arrangement" proposed by the petition is that the Bankruptcy Court:

Take possession of the stocks and bonds *which Historical Society has bought as trustee for Pioneer and which are now in possession of Historical*;[11]

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[7]Pet. p. 2, line 28, to p. 3, line 7; Pet. p. 7, lines 11-14.

[8]Pet. p. 3, lines 9-26.

[9]Pet. p. 3, line 28, to p. 4, line 6.

[10]Pet. p. 4, line 8.

[11]Pet. p. 4, lines 17-19; Pet. p. 7, lines 11-14.

Pay out of said assets Pioneer's creditors and expenses of this proceeding;[12]

Reinstate Pioneer in possession of the remainder *"to be used in accordance with * * * their by-laws."*[13]

In the petition for stay concurrently filed Pioneer repeats that "all of the *funds claimed by debtor are * * * in the possession of the Historical Society as trustee"* and that the proceeding is "for the preservation of the *assets of the debtor."*

The order to show cause specifies funds *"constituting the assets of the debtor estate * * * now in the possession of * * * Historical Society."*

The order addressed to Historical Society describes it as "trustee of funds *turned over to it as trustee for * * * Pioneer Society";* and the order addressed to The Farmers and Merchants National Bank of Los Angeles describes it as "custodian of the *funds and securities of * * * Pioneer Society which are held by the Historical Society as trustee."*

Each of the typewritten papers just referred to bears the printed card of Morris Lavine, attorney for the petitioner.

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[12]Pet. p. 4, lines 21 and 22; Pet. p. 7, line 30; Pet. p. 6, lines 22-25.

[13]Pet. p. 4, lines 24-26; Pet. p. 5, lines 2-4; Pet. p. 8, lines 7-13.

Petitioner's Allegations Are in Diametrical Opposition to the Adjudication by the Supreme Court of California and the Admitted Facts.

There is shocking inconsistency between the allegations and implications in the petitions and other papers and the decision of the Supreme Court of California. The diametrical opposition between the petition and the facts admitted at the hearing by Pioneer's counsel is equally striking.

The Supreme Court pointed out that Pioneer's amendment of its by-laws, obtaining the declaratory judgment, the liquidation of assets and dissolution proceedings, were steps in the scheme (thwarted by the Attorney General's intervention) to divert the trust assets from the charitable purpose to the private use of Pioneer's members. It held the by-law amendment abortive (40 Cal. 2d p. 862); the declaratory relief action collusively colorable and the judgment ineffective against the intervenors (40 Cal. 2d p. 857); that a "charitable corporation cannot dissolve and distribute its assets among its members," and that the "members of Pioneer have not at any time had any right to receive the property" (40 Cal. 2d p. 863).

Pioneer's course in the trust betrayal is thus described in the Court's opinion:

> "Pioneer amended its by-laws to close its membership and provide that existing members had a proprietary interest in its assets; it brought a declaratory relief action to obtain a ruling that the assets were not held in trust, paying the attorney fees for both parties thereto;[14] it sold its assets and reduced its

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[14]The judgment also declared that the assets could be distributed among Pioneer's members [Tr. 7-30-54, p. 23, lines 4-7].

property to cash; it commenced dissolution proceedings; and it maintained in the trial court, in a petition for writs of prohibition and mandate, and on this appeal that its assets are not held for charitable purposes.

*"Pioneer's course of conduct * * * thus demonstrates that it has abused and abandoned its trust and amply supports the determination * * * that a new trustee should be appointed."* (40 Cal. 2d pp. 856, 861-862.)

With reference to revocation (after judgment) of the dissolution resolution, the Supreme Court held that it had no effect on the proceeding by the Attorney General (40 Cal. 2d p. 864).

Pioneer's Counsel at the Hearing Before Judge Mathes on July 28 and 30, 1954, Admitted That Vital Allegations of the Petition Are False.

The transcript of this hearing covers more than 100 pages of typewritten matter.

The obligations, payment of which out of trust funds is sought, were thus stated by Mr. Lavine:

Lavine's fees and expenses	$13,000.00
Accountants' fees	380.00
Bond	13.50
Photostats	10.50
Flowers	6.21
Stamps	3.50
	$13,413.71[15]

[15]Tr. 7-28-54, p. 3, lines 17-21; p. 4, line 23; p. 6, line 6.

It was admitted, also, that the Superior Court had been asked for, and had refused, permission to pay these bills out of the trust fund.[16]

With specific reference to the allegations of the petition, Mr. Lavine admitted:

(a) The only title Pioneer ever had or could claim to the assets which the petition asks the court to take over was as trustee;[17]

(b) Historical was appointed by the judgment successor to Pioneer as trustee, and has taken over the impounded trust funds; the judgment was affirmed, and has long since become final;[18]

(c) The judgment placed title to all of Pioneer's assets in Historical as trustee for the charitable purposes stated in Pioneer's articles; Historical is *not* trustee for Pioneer;[19]

(d) As between Historical and Pioneer the former has final adjudication of title in its favor;[20]

(e) "The Court—* * * the Superior Court, back in 1950, put * * * title to all the assets of Pioneer * * * in the successor trustee, Historical.

Mr. Lavine—That is right.

The Court—That judgment * * * has long since become final, has it not?

Mr. Lavine—That is correct, your Honor.

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[16]Tr. 7-28-54, p. 5, line 21, to p. 6, line 5.

[17]Tr. 7-28-54, p. 18, lines 2-20; Tr. 7-28-54, p. 23, lines 3-23; Tr. 7-30-54, p. 40, line 21.

[18]Tr. 7-28-54; p. 22, line 13.

[19]Tr. 7-30-54, p. 36, line 9; Tr. 7-30-54, p. 40, line 12.

[20]Tr. 7-28-54, p. 23, line 9.

The Court—What else is there to talk about? How could this court possibly, except in utter defiance of the State law, hold that this debtor has any possible claim to these assets, title to which has been placed in Historical by a judgment of the State Court, affirmed by the highest court of the State and review denied by the Supreme Court of the United States, long since final? How could this court under any conceivable theory disturb that title?

Mr. Lavine—Its only title (is) as trustee and—

The Court—*That's the only title that Pioneer ever had or could possibly claim.*

Mr. Lavine—*That is right;* but certainly *had a right to re-petition for its return.*

The Court—*No mention of that is made in this petition * * * no mention * * * of the judgment of the State Court. This court was not informed of the Pioneer case or of its appeal * * *.*"[21]

"The Court—On page 6, lines 1-4, the petition alleges,

'The debtor proposes to obtain the money, which is in excess of $95,000 from stocks and bonds which the Historical Society has bought as trustee for Los Angeles County Pioneer Society and which will be turned over to the trustee to be appointed by this Court.'

Mr. Lavine—That omitted * * * 'for the purposes set forth in the articles of the Los Angeles County Pioneer Society.' "[22]

In face of the final adjudication and these admissions, the proposal that the Bankruptcy Court not only authorize

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[21]Tr. 7-30-54, p. 40, line 12, to p. 41, line 14.

[22]Tr. 7-30-54, p. 35, line 25, to p. 36, line 15.

payment out of the trust fund of expenses incurred by Pioneer in its attempt to defeat and betray the trust but reinstate Pioneer in possession of the balance of the fund with express authorization to use the same in accordance with the judically condemned by-laws, adds insult to injury.

Assets of the Charitable Trust Are Not Includable in the Bankruptcy Proceeding; and Accounting or Other Proceedings Incidental to Administration of the Trust Cannot Be Stayed by the Bankruptcy Court.

Admittedly the property in Historical's possession belongs to the public charitable trust, and had been taken away from Pioneer and turned over to Historical because the former had been tried and found faithless as fiduciary.

It is settled that property held by a debtor as fiduciary cannot be included in a bankrupt's estate, and that legal proceedings incident to the administration of the trust may not be stayed by the bankruptcy court.

Remington on Bankruptcy, Sec. 1212;

In re Commonwealth Bond Corporation; Evans v. Mann (C. C. A. 2, 1935), 77 F. 2d 308, 309-310;

In re Prudence Bonds Corporation (C. C. A. 2, 1935), 79 F. 2d 212;

Guarantee Bond & Mortgage Co. v. Hilding (C. C. A. 6, 1923), 290 Fed. 22, 29.

Of necessity, accounting by Pioneer is purely incidental to the administration of the public trust and pursuant to a final judgment of the State Court. Obviously, Pioneer has evinced and continues to exhibit strong disinclination to make the accounting.

The Orders Were Signed Under Gross Misapprehension, Were Properly Vacated When the Truth Was Disclosed, and No Reason for Their Reinstatement Is Suggested.

Obviously, had petitioner disclosed the decision of the State Court, or had he stated to Judge Harrison the truth as later admitted before Judge Mathes, the stay and restraining orders would never have been signed.

Pioneer's flagrant sins of omission and commission were not disclosed until the hearing before Judge Mathes.

Under its general equity powers, and to protect the public and its own jurisdiction against abuse, the court not only had ample authority but was in duty bound to terminate interference with the carrying out of the judgment of the State Court in a matter peculiarly within the latter's jurisdiction in the administration of a public charitable trust.

> *Securities Com'n v. U. S. Realty Co.* (1940), 310 U. S. 434, 456-458.

As said by the Circuit Court of Appeals for the Eighth Circuit, when an application for judicial action is presented,

> "the District Judge * * * is not a ministerial, but a judicial, officer, whose first duty is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud."
>
> *Zeitinger v. Hargadine-M'Kittrick Dry Goods Co.* (C. C. A. 8, 1917), 244 Fed. 719, 723.

> "* * * the court is the protector of the purity of its own process, and may take such steps as are necessary to protect against its abuse, on its own motion, or upon the suggestion of a stranger; and neither state statutes nor ordinary procedural rules can thwart a prompt and efficacious discharge of that paramount obligation." (Citing numerous authorities.)
>
> *Pueblo de Taos v. Archuleta* (C. C. A. 10, 1933), 64 F. 2d 807, 812.

When the facts were disclosed at the hearing, Judge Mathes put an end to the obvious and admitted imposition which had been perpetrated upon both the District and the State Courts.

Nothing has since occurred to mitigate the conditions then disclosed.

Pioneer Cannot Be Dissolved Until It Complies With the Judgment and All Litigation Is Disposed of.

Petitioner's statement that the Superior Court intends to dissolve Pioneer before any of the things required by the judgment are done carries its own refutation.

Under the judgment Pioneer must first make the accounting; it must then close up its business and report to the court; after approval of the report, and then only, can dissolution take place.

The judgment, common sense and judicial comity alike preclude dissolution until not only all these things are accomplished, but this proceeding and all other litigation in which Pioneer is involved are concluded.

Conclusion.

The form and contents of the petition and petitioner's conduct demonstrate complete absence of the "clean hands" always essential on the part of everyone who seeks the aid of any court and especially of a court of equity.

Respectfully submitted,

LAWLER, FELIX & HALL,

OSCAR LAWLER,

Attorneys for Historical Society of Southern California.

No. 14539

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Reply of Historical Society of Southern California to Opening Brief of Los Angeles County Pioneer Society.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTE

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Reply of Historical Society of Southern California to Opening Brief of Los Angeles County Pioneer Society.

Introductory Statement.

Appellant, a public charitable corporation, was, in 1950, by final judgment of the State Court, adjudged faithless to its trust, shorn of its property, and required to account, wind up its affairs, and dissolve; Historical Society of Southern California was appointed successor trustee and invested with title to the entire assets of the trust.[1]

Following affirmance of the judgment, time for the accounting was fixed for July 27, 1954.[2]

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[1]*In re L. A. County Pioneer Society, a Corporation, in Process of Voluntary Dissolution; L. A. County Pioneer Society, et al., Appellants, v. Historical Society of Southern California (a Corporation) et al., Respondents; The People, etc. Interveners and Respondents* (1953), 40 Cal. 2d 852.

[2]Tr. 7-30-54, p. 27, line 5.

On July 26, 1954, appellant filed in the Bankruptcy Court petition "for arrangement" under Chapter XI of the Bankruptcy Act, sworn to by its President. Therein it says nothing about the judgment, alleges that it is a "non-profit" corporation,[3] that it *owns* the assets of which it had been shorn by the judgment,[4] that Historical holds said assets as trustee for Pioneer,[5] and asks the Bankruptcy Court to take said assets away from Historical, pay therefrom expense incurred by appellant in betraying and despoiling the trust and reinstate appellant in ownership and possession of the remainder,[6] with specific authority to dispose thereof in accordance with appellant's amended by-laws which had been adjudged fraudulent by the State Court.[7]

In presenting the petition appellant's correct status and the nature of the pending accounting proceeding were misrepresented,[8] and the existence of the final judgment of the State Court concealed.[9]

July 26, 1954, appellant obtained an order (served July 27, 1954) restraining proceedings in the State Court.[10] Request that the order be vacated was immediately made

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[3]Pet. for Arr. p. 1, lines 22-23.

[4]Pet. for Arr. p. 4, lines 17-19; p. 5, lines 1-4; p. 7, lines 11-14.

[5]Pet. for Arr. p. 7, lines 11-14.

[6]Pet. for Arr. p. 4, lines 17-27; p. 5, lines 1-4; p. 6, lines 22-25.

[7]40 Cal. 2d 862-863. Pet. for Arr. p. 1, line 23; p. 3, lines 28 *et seq.;* p. 4, lines 17-19; p. 4, lines 21-26; p. 7, lines 11-14.

[8]Pet. for Arr. p. 1, lines 22-23; Pet. for Order to Show Cause, Pars. I and II.

[9]Tr. 7-30-54, p. 41, lines 10-14; p. 42, lines 19-21; p. 43, lines 9-10; p. 44, line 21; p. 47, lines 22-24; p. 48, lines 13-15; p. 49, lines 18-20; p. 51, lines 13-16.

[10]Restraining Order, p. 1.

to Judge Harrison. Pursuant to arrangement made by him with Judge Mathes, hearing was held by the latter July 28 and 30, 1954, which was participated in by all parties without objection.[11]

Thereat, the facts about the judgment, appellant's corporate status, the accounting proceeding, and the falsity of the petition were admitted.[12]

On July 28, 1954, the restraining order was vacated,[13] and on July 30, 1954, the petition for arrangement was dismissed.[13a]

This appeal followed.

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[11]Tr. 7-28-54, p. 2; p. 14, line 17; p. 15, line 14; p. 18; pp. 20-22; p. 26, line 19; p. 28, lines 3-19; p. 30, line 14; p. 31, lines 10-20; p. 37, lines 2-16; p. 38, line 7; p. 39, line 4; p. 40, lines 5-21; pp. 41-44. Tr. 7-30-54, pp. 2-7.

[12]Op. of State Supreme Court, 40 Cal. 2d 852, Tr. 7-28-54, p. 36, lines 10-21.

Impounding order, Tr. 7-30-54, p. 38.

Interlocutory judgment, Tr. 7-28-54, p. 31.

Order appointing Historical Society Trustee, Tr. 7-30-54, pp. 9-12.

Acceptance of appointment, Tr. 7-30-54, p. 14.

Declaratory judgment, Tr. 7-30-54, pp. 18-23.

Review of State Court record by Judge Mathes, Tr. 7-30-54, pp. 29-34.

Review of pet'ns for arr. and to show cause by Judge Mathes, Tr. 7-30-54, pp. 35-36, 41-53.

Pioneer admits title adjudication is final and that it has no title, Tr. 7-30-54, pp. 40-41.

Effect of adjudication stated, Tr. 7-28-54, p. 26, line 30.

State Court's refusal to pay Lavine out of trust fund, Tr. 7-30-54, p. 26.

Concealment by Pioneer of State Court judgment, Tr. 7-30-54, p. 41, lines 10-14; p. 42, lines 19-21; p. 43, lines 9-11; p. 44, lines 4-8 and 21; p. 47, lines 22-24; p. 48, lines 13-15; p. 49, lines 18-20; p. 51, lines 13-16.

[13]Tr. 7-28-54, p. 37, line 17.

[13a]Tr. 7-30-54, p. 54, lines 18, *et seq.*

Disregard in the Opening Brief for conclusive adjudications against appellant, and other undisputed and indisputable matters upon which the vacation of restraining order and dismissal of the petition were based, renders statement thereof necessary.

The Facts.

Los Angeles County Pioneer Society was, in 1921, and, again, in 1953, adjudged to be a California corporation organized and existing for a single public charitable purpose.[14]

In each case appellant's contention that it is a *non-profit social,* and *not a charitable,* corporation, was rejected.

The second case, initiated in 1949, by petition sworn to by Pioneer's President, Frank Y. Pearne (who likewise verified the petition for arrangement herein), is the same case No. 562960 entitled "In the Matter of Los Angeles County Pioneer Society, a corporation, in the Process of Voluntary Winding Up" referred to in Paragraph I of the "Petition for Order to Show Cause Restraining Proceedings in the Superior Court." Therein Pioneer, claiming to be "a non-profit" corporation, sought to dissolve and divide its property *pro rata* among its members. The Attorney General intervened, alleging abandonment of the trust, *mala fides* in its administration, Pioneer's intention to misappropriate the trust assets, and abuse by

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[14]*In the Matter of the Estate of Victor Dol, Deceased, Los Angeles County Pioneer Society, Respondent, v. Frank P. Flint, et al., Executors, Appellants* (1921), 186 Cal. 64.

In re L. A. County Pioneer Society, a Corporation, in Process of Voluntary Dissolution; L. A. County Pioneer Society, et al., Appellants, v. Historical Society of Southern California (a Corporation) et al., Respondents; The People, etc., Interveners and Respondents (1953), 40 Cal. 2d 852.

Pioneer of its corporate powers and privileges. The Attorney General's allegations included: public policy requires that the assets in Pioneer's possession "remain charged with the public charitable and benevolent trust * * * to the end that the trust may not fail;"[15] that Pioneer had not, for more than five years devoted the assets to the public charitable trust;[16] that by the dissolution proceeding, Pioneer was "seeking to dispose of the Society's assets contrary to the public and charitable purpose," to the irreparable injury of the People of the State.[17]

Prayer is for Pioneer's *dissolution and disposition of its assets in such manner that they will remain dedicated to the trust.*[18]

On the filing of the complaint $95,187.37 in Pioneer's possession was impounded,[19] which, after judgment, was turned over to Historical Society of Southern California as successor trustee.

May 18, 1950, the court found that Pioneer had abandoned the charitable purposes for which it was organized; that it was seeking and intending to wrongfully divert the trust assets to the private enrichment of its individual members; and that Pioneer's closing of its membership rolls, obtaining, in a declaratory relief action wherein it paid the attorneys on both sides, judgment that its assets were subject to no trust, and initiating the proceeding to dissolve and distribute its assets among its members, were all in pursuit of the unlawful purpose to wrongfully divert the trust assets to the private use of

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[15]Clk. Tr. p. 14, line 18.
[16]Clk. Tr. p. 15, line 24.
[17]Clk. Tr. p. 13, line 26, to p. 14, line 14.
[18]Clk. Tr. p. 15, lines 5, *et seq.*
[19]Clk. Tr. p. 71; Tr. 7-30-54, p. 38.

Pioneer's members; the court concluded that the property in Pioneer's possession is *corpus* of the charitable trust for which Pioneer was incorporated; that Pioneer had abandoned, betrayed and abused the trust, that appointment of a successor trustee, accounting by Pioneer, *and the taking of all competent action by it to conclude and dissolve the corporation were necessary.*[20] It entered interlocutory judgment that Pioneer had abandoned, been faithless to, and threatened and intended to despoil the trust, and that a new trustee was necessary; it directed Pioneer to account and report to the court, and, on the approval of the account and report, *to wind up its affairs and dissolve.*[21]

October 18, 1950, Historical Society was appointed successor trustee, all trust assets were ordered delivered to it, and the impounded assets were turned over to the successor trustee.[22]

December 16, 1950, Pioneer appealed from the judgment,[23] which was affirmed May 5, 1953,[24] and certiorari denied by the Supreme Court of the United States January 4, 1954.[25]

In affirming the judgment, the State Supreme Court reviews in detail appellant's conduct, holds that all property acquired by Pioneer, including the particular gifts, devises and bequests referred to in the petition for arrangement, is subject to the trust; that a declaratory judgment to the contrary in the case wherein Pioneer was

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[20]Clk. Tr. pp. 47, *et seq.*
[21]Clk. Tr. pp. 51-53; Tr. 7-28-54, p. 31.
[22]Clk. Tr. p. 81; Tr. 7-30-54, pp. 9-12.
[23]Clk. Tr. p. 54.
[24]See 40 Cal. 2d 852, *supra.*
[25]346 U. S. 888 and 928.

plaintiff and paid the attorneys on both sides, and to which the Attorney General was not a party, was colorable and ineffective; that Pioneer's members had no proprietary right, title or interest in the property; that an amendment to the corporation's by-laws closing membership and declaring that existing members have such proprietary interest is invalid; that a charitable corporation cannot dissolve and divide its property among the members, and that Pioneer cannot lawfully make such distribution. The Court concluded that, by the course of conduct recited, and by maintaining "in the trial court, in a petition for writs of prohibition and mandate, and on this appeal that its assets are not held for charitable purposes," Pioneer demonstrated "that it has abused and abandoned its trust and amply supports the determination of the trial court that a new trustee should be appointed."[26]

Upon return of the case to the Superior Court, and on June 29, 1954, Pioneer's request to that court for payment out of the trust funds of Lavine's attorney's fees and expenses ($13,000.00) in and since the appeal was denied.[27] At the same time, on Mr. Lavine's representation to the court that accounting would be made as required by the judgment, July 27, 1954, at 10 a.m., was fixed as the time therefor.[28]

Instead of the promised accounting, appellant filed the petitions for arrangement and for restraining order, which were presented to the Bankruptcy Court by Mr. Lavine. The restraining order, signed by District Judge Harrison, was issued July 26, 1954, and served on Judge Pope of the Superior Court at 10 a.m., July 27, 1954.

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[26]40 Cal. 2d 861-862.

[27]Tr. 7-28-54, p. 3, lines 17-21; p. 4, line 23; p. 6, line 6; p. 24, line 6. Tr. 7-30-54, p. 26, line 21.

[28]Tr. 7-30-54, p. 27, line 5.

Allegations of the Petitions.

The petition for arrangement alleges that Pioneer is a *"non-profit"* corporation; that it *owns* the impounded $95,263.67; that Historical Society holds the money *as trustee for Pioneer,* and, *as such trustee* for Pioneer, has bought stocks and bonds with the money. The petition proposes and asks that the assets be taken away from Historical by the trustee to be appointed by the Bankruptcy Court, that the bankruptcy trustee pay therefrom Pioneer's debts (being Pioneer's fees and expenses incurred by it "in these proceedings") and turn the remainder over to Pioneer *to be used in accordance with its* (unlawful) *by-laws.*

The petition for restraining order, concurrently filed and presented, alleges (Par. II) that in State Court Proceeding No. 562960 Pioneer "revoked the said proceeding and petitioned the court for revocation of its previous proceedings to voluntarily wind up its affairs and to allow it to continue and allow it to restore its funds and meet its obligations,"[29] and that the Superior Court "has announced that it will not permit" Pioneer "so to do," and will, on July 27, 1954, at the hour of 10 a.m. dissolve the Society.[30]

The truth about State Court Proceeding No. 562960, the judgment therein, and the true status of that case on July 26, 1954, were concealed from the District Court

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[29]The revocatory proceding was held ineffective by the State Supreme Court (see 40 Cal. 2d 864).

[30]Dissolution can, under the judgment, take place only *after* settlement of the accounting. The record contains no support for this allegation in the petition.

when the petitions were presented and the restraining order issued.[31]

Following service of the restraining order on Judge Pope, District Judge Harrison was asked to vacate the order. Being engaged in a trial, Judge Harrison arranged with Judge Mathes to hear the matter; responsive to notification from Judge Mathes, all parties appeared in open court, and the hearing, participated in by all parties without objection, was proceeded with on July 28th and concluded July 30, 1954.[32]

At the hearing Mr. Lavine informed the court that the obligations "incurred in these proceedings," referred to in and payment of which is asked by the petition, amount to $13,413.71; that $13,000.00 thereof was for Lavine's fees and expenses, and that claim therefor had been presented to and disallowed by the Superior Court.[33]

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[31]Tr. 7-30-54, p. 40, line 12, to p. 41, line 14.

[32]For particulars as to presentation of the petitions, arrangement for hearing by Judge Mathes and participation of appellant and all other parties in the hearing, see:

Tr. 7-28-54, p. 2, lines 3-22; p. 11, lines 1-25; p. 14, line 17. Tr. 7-30-54, p. 2, line 1, to p. 8, line 1; p. 18, line 1, to p. 19, line 8; p. 24, line 1, to p. 25, line 17; p. 28, lines 1-6; p. 31, lines 9-11; p. 34, line 24, to p. 35, line 1; p. 36, line 6, to p. 37, line 11; p. 40, line 1, to p. 41, line 14; p. 46, lines 5-13.

[33]Tr. 7-28-54, p. 3, lines 17-21; p. 4, line 23; p. 6, line 6; p. 24, line 6. Tr. 7-30-54, pp. 26-27.

As Lavine's services commenced with the notice of appeal from the judgment in case No. 562960, filed December 16, 1950, they were entirely in support of the conduct of Pioneer, which the Supreme Court held demonstrated abandonment, abuse, betrayal and spoliation of the trust.

Rewarding a faithless trustee for activities in fraud of his fiduciary relationship is, of course, judicially unthinkable. Besides, the Superior Court, the proper tribunal to consider the matter, had adjudicated the claim [Tr. 7-28-54, p. 24, line 6; Tr. 7-30-54, pp. 26-27].

At the hearing, responsive to the Court's questions, Lavine admitted that the only title Pioneer *ever had or could claim* to the assets (of which, in the petition, Pioneer alleges outright ownership) was as trustee, and that the judgment in Case No. 562960, ending its trusteeship, taking the title away from Pioneer and vesting it in Historical Society as successor trustee, was final.[34]

Pioneer also admitted that by the judgment which was affirmed in 40 Cal. 2d 852, title to the "in excess of $95,000.00" mentioned in the petition for arrangement had been vested in Historical Society as trustee and that the judgment has been final ever since 1953.[35]

The Adjudications and Appellant's Admissions Left No Alternative to Vacating the Restraining Order and Dismissing the Petition.

Contrast between the petition for arrangement and conclusive adjudications and other facts admitted by appellant and with which both Pioneer and its attorney were especially familiar, is so striking as to require no comment.

The opening brief admits that on Pioneer's accounting, which was proceeded with after vacation of the order, the court surcharged Pioneer $7,578.76, with interest, for misappropriated trust funds.[36]

Thus, adjudged faithless as trustee and flaunting the requirement that it account for its trusteeship, its hands unclean with misappropriated trust funds, appellant, on July 26, 1954, presented to the District Court a false

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[34]Tr. 7-28-54, p. 23, line 11; Tr. 7-30-54, p. 40, lines 12 and 21.

[35]Tr. 7-28-54, p. 20, line 17; p. 23, line 19; p. 40, line 18. Tr. 7-30-54, p. 36, line 9.

[36]Op. Br. p. 9, line 18.

petition, asking judicial seizure of trust property in which Pioneer admits it has no right, title or interest, payment therefrom by the court of obligations incurred by Pioneer in betraying and despoiling the trust, and reinstatement of appellant in possession of the remaining trust assets, with specific authority to dispose thereof in accordance with its (unlawful) amended by-laws.[36a]

Relying on these allegations and uninformed about and without knowledge of the judgment, Judge Harrison signed the restraining order. Upon disclosure at the hearing of the facts and the gross imposition on the District Court, the order was vacated and the petition for arrangement dismissed.

Thus, frustrated by the State Court judgment in its attempt to fraudulently use the *State* process of dissolution to spoliate the betrayed charitable trust, and being thereby ordered to account and dissolve, appellant here sought to similarly utilize the *Federal* process prescribed by Chapter XI of the Bankruptcy Act, and, by dissimulation, misrepresentation, concealment, downright falsehood and deception, to thereby evade the judgment, escape accounting and dissolution, and be reinstated in possession and ownership of trust property, in which it confessedly had no shadow of right, title or interest, with specific authorization to dispose of the property in a manner adjudged fraudulent by the State Court.

A more brazen imposition on a court or a more flagrant abuse of judicial process could not be imagined.

The applicable law is elementary:

> " 'It is one of the fundamental principles upon which equity jurisprudence is founded, that *before a*

[36a]See 40 Cal. 2d 861-862.

complainant can have a standing in court he must first show that *not only* has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.' Story's Equity Jurisprudence, 14th ed., § 98. The governing principle is 'that whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' Pomeroy, Equity Jurisprudence, 4th ed., § 397. This Court has declared: 'It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.' *Bein v. Heath,* 6 How. 228, 247." (Italics supplied.)

Keystone Co. v. Excavator Co. (1933), 290 U. S. 240, 244:

"The authorities and the reason of the rule leave no question as to the right of a Court, and its duty to dismiss from its consideration a case based upon a consideration which contravenes public policy. Courts do not sit to give effect to such illegal contracts. The law is not to be subsidized to overthrow itself, though the parties to the litigation may not object to such a meretricious exercise of power. If

the public time and the authority of law were thus at the mercy of litigants, the sense of dignity and obligation to the laws, from which the Court derives its powers, would constrain it to desist from the suicidal task of subverting the laws which it was organized to preserve and administer."

Valentine v. Stewart (1860), 15 Cal. 387, 405.

"A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto."

Kreamer v. Earl (1891), 91 Cal. 112, 118.

The good faith indispensable to every request for judicial aid is a statutory prerequisite with respect to a petition for arrangement under the Bankruptcy Act.

11 U. S. C. A., Sec. 761, p. 608.

Common honesty and proper respect for the courts and for judicial process left no alternative to clearing the court's docket of the gross deception and imposition here proposed and practiced by Pioneer. Vacation of the restraining order and dismissal of the petition were not only proper, but imperative.

Respectfully submitted,

LAWLER, FELIX & HALL,

OSCAR LAWLER,

Attorneys for Historical Society of Southern California.

No. 14539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE LOS ANGELES COUNTY PIONEER SOCIETY,

Appellant,

vs.

STATE OF CALIFORNIA and HISTORICAL SOCIETY OF SOUTHERN CALIFORNIA,

Appellees.

APPELLEES' BRIEF.

EDMUND G. BROWN,
Attorney General,
EDWARD SUMNER,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 14539.

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Appellees.

APPELLEES' BRIEF.

To the Honorable the United States Court of Appeals for the Ninth Circuit:

Preliminary Statement.

It must be emphasized at the outset of this Honorable Court's consideration of this matter that we are not concerned here with an appeal taken in the ordinary and accepted manner from an adverse decision of a district court rendered upon pleadings duly and regularly filed and proceedings conducted in the usual manner in which proceedings are conducted after issue has been joined.

Reference to Appellant's Opening Brief fails to disclose that the true and proper parties to the controversy from

which stem the proceedings in the court below and in this Honorable Court were and are Los Angeles County Pioneer Society and the beneficiaries of the public charitable trust of which the Pioneer Society was trustee, it being an established principle in the State of California and generally that beneficiaries of charitable trusts can sue or be sued only by or through the Attorney General of the State. The Historical Society of Southern California became a party to the controversy when it was named, in the course of proceedings in the State courts, to succeed the Los Angeles County Pioneer Society as trustee of the aforesaid public charitable trust.

It would appear accordingly, if there be a properly perfected appeal pending before this Honorable Court, the objective of the appeal being simply to wrest for private use and from the Historical Society, as trustee of a public charitable trust, funds dedicated to beneficiaries represented solely by and through the Attorney General of the State of California, that the proper party appellees are the Attorney General of the State of California and the Historical Society of Southern California, rather than the "State of California" and the Historical Society as set forth in the caption of Appellant's Opening Brief. Although we raise no issue regarding the inaccurate designation of the appellees by appellant, we direct this Court's attention to this point for the sake of accuracy inasmuch as to avoid confusion we have continued the use of the caption first employed by appellant.

Statement of the Case.

In view of the full and complete recital by Justice Traynor in his decision in *Los Angeles County Pioneer Society, et al. v. Historical Society of Southern California, et al.,* 40 Cal. 2d 852, 257 P. 2d 1, of most of the pertinent facts involved in the instant appeal preceding appellant's entry into the federal district court, and in view of the full and complete statement contained in the brief filed by Oscar Lawler, Esq., on behalf of the Historical Society of Southern California supplementing Justice Traynor's decision to complete the statement of all the pertinent facts involved herein, we will not burden this Court by an attempt to rephrase and duplicate the factual recitals in Justice Traynor's opinion and in Mr. Lawler's brief, but respectfully request this Honorable Court to deem Justice Traynor's opinion and Mr. Lawler's brief included herein by reference as if set forth in full herein.

We join with Mr. Lawler in specifically emphasizing the total and established failure of the documents filed by appellant with the district court, and purporting to commence a bona fide Chapter XI proceeding, to disclose material factual information, including the action of the California Supreme Court in 40 Cal. 2d 852, *supra,* although this information, as is indisputably apparent, was in appellant's possession at the time.

ARGUMENT.

I.

Dissolution of a Corporation Pursuant to a Judgment Rendered by a Court of Competent Jurisdiction Cannot Be Avoided or Delayed by or Through Resorting to the Commencement of a Chapter XI Proceeding.

As the record herein, the decision of the California Supreme Court in 40 Cal. 2d 852, *supra,* and the brief of our co-appellee, Historical Society of Southern California, amply establish, appellant purported to commence a proceeding under Chapter XI of the Bankruptcy Act after a final judicial determination that appellant was the trustee of a public, charitable trust; that all assets in the custody, possession or control of appellant constituted the assets of that public, charitable trust; that appellant's custody, possession or control of such assets was solely that of a trustee of said public charitable trust and not as owner; that the Historical Society was the duly appointed successor trustee of the aforesaid charitable trust assets; that appellant was required to render a formal accounting of its trusteeship of the aforesaid charitable trust; and that upon said accounting appellant would be formally dissolved by judicial decree.

Obviously, apart from judicial authority therefor, no purpose could possibly be served by permitting appellant to proceed with a Chapter XI proceeding, even if appellant had straightforwardly attempted to do so by way of a petition predicated upon the facts as they in reality existed at the time the "petition" involved herein was filed, inasmuch as a Chapter XI proceeding is intended only to so arrange the financial affairs of a corporation that the corporation may be enabled to continue its cor-

porate existence, whereas appellant's corporate death had been judicially decreed by final judgment of the State court. It is this common sense approach to a resolution of the problem presented to the Bankruptcy Court, when a corporation whose imminent dissolution has been decreed by a court of competent jurisdiction seeks to postpone or avoid the death penalty by seeking refuge in a Chapter XI proceeding, which has been followed by the United States Supreme Court in *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corporation,* 302 U. S. 120, 58 S. Ct. 125, and by the United States Court of Appeals for the Third Circuit in *In re Distillers Factors Corp.,* 187 F. 2d 685. In the latter case the Court of Appeals affirmed the action of a District Court Judge, who dismissed a Chapter XI proceeding *sua sponte,* immediately upon ascertaining that the State, in which the petitioner had been incorporated, had commenced action which would result in the corporation's dissolution. It was the view of the Court of Appeals that the filing of a petition under Chapter XI by a corporation well on the road to final dissolution is, as the brief filed by the Historical Society contends, an obvious imposition upon the court requested to entertain the petition.

II.

The Action of the District Court Was Not Arbitrary in Any Respect.

Although, in view of the established, manifest, substantial variances between the matters contained in the various documents stricken by the court below and the facts, there appears to be no need to analyze the Statement of Facts contained in Appellant's Opening Brief, it must be emphasized in fairness to the District Court Judge that coun-

sel for appellant was apprised of our intention to secure a dismissal of the Chapter XI proceeding on the morning of July 27, 1954; that the office of appellant's counsel was advised shortly after the luncheon hour on July 27, 1954 that the Honorable William C. Mathes, District Judge, would review the pending Chapter XI proceeding the next day at 2:00 P. M.; that appellant appeared and participated in said hearing on July 28, 1954 without objection although it was fully apparent that the District Judge was considering our request that he dismiss the pending Chapter XI proceeding on his own motion [Rep. Tr. pp. 26-29]; and that upon continuance of the hearing to July 30, 1954 appellant again appeared and participated therein without objection and with full knowledge of our request that the District Judge dismiss the Chapter XI proceeding on his own motion.

Conclusion.

For the reasons set forth above and in the brief filed by the Historical Society of Southern California, in which, as set forth above, we concur, it is respectfully submitted that the orders below should be affirmed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,

EDWARD SUMNER,
Deputy Attorney General,
Attorneys for Appellees.

No. 14540

United States
Court of Appeals
for the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 262, inclusive)

Petition for Review and Petition to Enforce Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—1-6-55

No. 14540

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Transcript of Proceedings—(Continued)

Witnesses:

GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

* * * * *

Case No. 19-CA-806. Date Filed 4-20-53. Compliance Status Checked by 1-31-54—mm.

1. Employer against whom charge is brought: Boeing Airplane Company, East Marginal Way, Seattle, Washington.

Number of workers employed: 30,000.

Nature of employer's business: Aircraft Industry.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

Since on or about July 1, 1952, it, through its officers, agents, and supervisory employees, has refused to bargain in good faith with Seattle Professional Engineering Employees Association which at all times has represented a majority of the Company's professional engineering employees and in an appropriate unit, and since that date has refused to bargain in good faith and does now refuse to bargain collectively in good faith with said labor organization and in violation of Section 8 (a) (5) of said Act.

That on or about Jan. 27th, '53 said Company terminated one Charles Robert Pearson, engineer, because of his membership in and activities on behalf of Seattle Professional Engineering Employees Association, and subsequently while re-employing him, required him to hire in as a new employee with loss of all rights and privileges inhering in prior employment, in violation of Section 8 (a) (3) of said Act.

That by the acts and statements set forth in the paragraphs above and by other acts and statements, it has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of said Act and in violation of Section 8 (a) (1) of said Act.

3. Full name of labor organization, including local name and number, or person filing Charge: Seattle Professional Engineering Employees Association.

4. Address: 3121 Arcade Building, Seattle, Washington. Telephone No. SE 4925.

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By M. W. McCUSKER,
Business Representative

Date: April 20, 1953.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

* * * * *

Case No. 19-CA-806. Date Filed 4-20-53. Amended 5-19-53. Compliance Status Checked by 1-31-54—mm.

1. Employer against whom charge is brought: Boeing Airplane Company, East Marginal Way, Seattle, Washington.

Number of workers employed: 30,000.

Nature of employer's business: Airframe manufacturing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

Since on or about July 1, 1952, Boeing Airplane Company, through its officers, agents, and supervisory employees, has refused to bargain in good faith with the Seattle Professional Engineering Employees Association (SPEEA) which at all times has represented a majority of the Company's professional engineering employees and in an ap-

propriate unit, and since that date has refused to bargain in good faith and does now refuse to bargain collectively in good faith with said labor organization and in violation of Section 8 (a) (5) of said Act.

That on or about January 27th, 1953 said Company terminated one Charles Robert Pearson, Engineering Designer "A", because of his membership in and activities on behalf of SPEEA, and subsequently rehired him as a new employee (March 17th, 1953), in violation of Section 8 (a) (3) of said Act.

That by the acts and statements set forth in the paragraphs above and by other acts and statements, it has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of said Act, and in violation of Section 8 (a) (1) of said Act.

3. Full name of labor organization, including local name and number, or person filing charge: Seattle Professional Engineering Employees Association.

4. Address: 3121 Arcade Building, Seattle 1, Washington. Telephone No. SE 4925.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: Engineers & Scientists of America.

6. Address of national or international, if any: 341 East Lake Street, Minneapolis 8, Minnesota.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By M. W. McCUSKER,
Business Representative

Date: 5-14-53.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-806

In the Matter of BOEING AIRPLANE COMPANY and SEATTLE PROFESSIONAL ENGINEERING EMPLOYEES ASSOCIATION

NOTICE OF HEARING

Please Take Notice that on the 23rd day of June, 1953, at 10:00 a.m., in Room 407, U. S. Court House Building, Fifth and Spring, Seattle, Washington, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of a verified answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Hearing to be signed by the Regional Director for the Nineteenth Region on this 3rd day of June, 1953.

/s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
407 U. S. Court House, Seattle 4, Washington.

GENERAL COUNSEL'S EXHIBIT No. 1-F

[Title of Board and Cause.]

COMPLAINT

It having been charged by Seattle Professional Engineering Employees Association that Boeing Airplane Company, at Seattle, Washington, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the Labor-Management Relations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel

of the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, acting pursuant to the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Boeing Airplane Company, hereinafter called the Respondent, is a Delaware corporation having its principal office in Seattle, Washington. The Respondent is engaged in the manufacture of aircraft and aircraft parts, operating plants at Wichita, Kansas, and at Seattle and Renton, Washington.

II.

The Respondent, in the course and conduct of its business and at all times herein alleged, continuously has purchased for use at its Seattle and Renton plants, materials, supplies and equipment originating at points outside the State of Washington, valued in excess of $1,000,000 annually, and continuously has manufactured at said plants and sold to agencies of the United States Government and to operators of commercial airlines, aircraft and aircraft parts valued in excess of $1,000,000 annually.

III.

Seattle Professional Engineering Employees Association, herein called SPEEA, is and, at all times hereinafter mentioned, has been a labor organization within the meaning of Section 2, subsection (5) of the Act.

IV.

On or about August 31, 1951, the Respondent and SPEEA entered into a collective bargaining agreement pursuant to which SPEEA was recognized by the Respondent as the exclusive collective bargaining representative of its employees in the following unit:

All employees in the Seattle plants of the Respondent in the following classifications:

Design Specialist "A"
Preliminary Design Engineer "A"
Research Specialist "A"
Aerodynamics Engineer "A"
Design Specialist "B"
Research Specialist "B"
Aerodynamics Engineer "B"
Engineering Designer "A"
Flight Test Engineer "A"
Research Engineer "A"
Structures Engineer "A"
Field Service Representative "A"
Production Design Engineer "A"
Senior Tool Engineer "A"
Coordinator "A"
Research Engineer "B"
Aerodynamicist "A"
Contract Specifications Engr. "A"
Engineering Liaison Man "A"
Flight Test Analyst "A"
Salvage Engineer "A"
Service Engineer "A"
Stress Analyst "A"

Weight Control Engineer "A"
Engineering Designer "B"
Quality Engineer
Associate Research Engineer "A"
Senior Tool Engineer "B"
Production Design Engineer "B"
Wind Tunnel Test Engineer "A"
Aerodynamicist "B"
Field Service Representative "B"
Stress Analyst "B"
Contract Specifications Engr. "B"
Junior Engineer "A"
Quality Analyst "A"
Tool Engineer "A"
Engineering Liaison Man "B"
Flight Test Analyst "B"
Associate Research Engineer "B"
Junior Engineer "B"
Quality Analyst "B"
Tool Engineer "B"

V.

The unit as described in paragraph IV, above, is now and, at all times hereinafter alleged, was an appropriate unit within the meaning of Section 9 (b) of the Act.

VI.

SPEEA is now and, at all times since at least August 31, 1951, has been the collective bargaining representative of a majority of the Respondent's employees in the unit described in paragraph IV, above, and by virtue of Section 9 (a) of the Act,

has been and now is the exclusive representative of all employees of the Respondent in said unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

VII.

On or about April 7, 1952, pursuant to notice given by SPEEA under the terms of the contract referred to in paragraph IV, above, the Respondent and SPEEA entered into negotiations concerning the terms of a new agreement. Negotiating meetings were held at various times thereafter throughout the year 1952, and into the year 1953, with the Respondent and SPEEA unable to reach mutual agreement on the terms of a new contract.

VIII.

On or about January 27, 1953, at a time when no agreement had as yet been reached with SPEEA, the Respondent discharged its employee, Charles Robert Pearson, because of his membership in and activities on behalf of SPEEA and because he had engaged in concerted activities within the meaning of Section 7 of the Act, viz.: Beginning on or about January 2, 1953, he acted as chairman of a committee formed by SPEEA to plan and operate a Manpower Availability Conference which had as one of its purposes, facilitating SPEEA's members in obtaining employment as engineers with companies other than the Respondent.

IX.

On or about January 27, 1953, Respondent refused and failed to bargain in good faith with SPEEA as the representative of its employees in the unit described above in paragraph IV by the discharge of Charles Robert Pearson, as set forth in paragraph VIII, above, for the purpose of restraining the Union's economic action undertaken to break the bargaining impasse then in existence; and by offering re-employment to said Charles Robert Pearson, on or about March 2, 1953, by a letter bearing that date, affirming and adhering to the course of conduct set forth above and thereby attempting to render ineffectual any further economic action of that nature that might be undertaken by the Union in the course of bargaining.

X.

On the date of his discharge, referred to in paragraph VIII, above, Charles Robert Pearson requested the Respondent to permit representatives of SPEEA to be present at the conference which immediately preceded his discharge, and the Respondent refused his request, although the Respondent's principal purpose in conducting the conference was to inquire into Pearson's activities in connection with the Manpower Availability Conference referred to in paragraph VIII, above.

XI.

On or about March 12, 1953, the Respondent unilaterally put into effect wage increases for the

employees in the appropriate unit referred to in paragraph IV, above.

XII.

By all the acts of the Respondent, as set forth and described in paragraphs VIII, IX, X, and XI, above, and by each of said acts, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of said acts, and by each of them, the Respondent has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

XIII.

By the discharge of Charles Robert Pearson, as set forth and described in paragraph VIII, above, the Respondent discriminated and now is discriminating against its employees in regard to hire or tenure of employment, and thus discouraged, and now is discouraging, membership in SPEEA, and thereby engaged in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XIV.

By the discharge of Charles Robert Pearson, as set forth and described in paragraph VIII, above, because of his participation in action designed to strengthen SPEEA's position in the bargaining negotiations with the Respondent, as set forth in paragraph IX, above; by the refusal to permit Pearson to be represented by representatives of

SPEEA in the conference immediately preceding his discharge, as set forth and described in paragraph X, above; and by unilaterally putting into effect wage increases at a time subsequent to Pearson's discharge and before such discharge was remedied, as set forth and described in paragraph XI, above, the Respondent has refused to bargain with SPEEA and thereby has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

XV.

The activities of the Respondent, as set forth and described in paragraphs VIII, IX, X, and XI, above, occurring in connection with the operations of the Respondent, as described in paragraphs I and II, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States, and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

The aforesaid acts of the Respondent, as set forth and described in paragraphs VIII, IX, X, and XI, above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3), and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 3rd day of June, 1953, issues this Complaint

against Boeing Airplane Company, the Respondent herein.

/s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19, Seattle, Washington.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 1-H

[Title of Board and Cause.]

ANSWER OF RESPONDENT BOEING AIRPLANE COMPANY

Respondent hereby answers the complaint, hereby adopting the abbreviated titles used therein, and alleges as follows:

I.

The allegations contained in paragraph I of the complaint are admitted.

II.

The allegations contained in paragraph II of the complaint are admitted.

III.

The allegations contained in paragraph III of the complaint are admitted.

IV.

The allegations contained in paragraph IV of the complaint are admitted except as to the inclusion by agreement of the classifications Facilities Engineer "A" and Facilities Engineer "B" in the definition of the unit represented by SPEEA, it be-

ing respondent's information and belief that SPEEA received less than a majority in a representation election held on September 24, 1952, in Case No. 19-RC-1175, to determine whether the unit was to be expanded to include such classifications, and that such classifications were determined by the Board in that case to be not within such unit.

V.

The allegations contained in paragraph V of the complaint are admitted (subject to the allegations in paragraph IV as to the classifications Facilities Engineer "A" and Facilities Engineer "B").

VI.

The allegations contained in paragraph VI of the complaint are admitted (subject to the allegations in paragraph IV as to the classifications Facilities Engineer "A" and Facilities Engineer "B"), and respondent further alleges that at all times since about May 8, 1946, pursuant to a consent election on or about that date, SPEEA has represented substantially the same unit, except for certain smaller groups that were added to the unit subsequent to that date.

VII.

The allegations contained in paragraph VII of the complaint are admitted.

VIII.

Answering paragraph VIII of the complaint:

Respondent admits that it discharged its employee, Charles Robert Pearson, on or about January 27, 1953, at a time when no new agreement had

as yet been reached with SPEEA. Respondent further admits and alleges that Pearson was discharged because of his activities in connection with the "Manpower Availability Conference" to which reference is made in said paragraph; is without knowledge as to whether, beginning on or about January 2, 1953, Pearson acted as chairman of a committee formed by SPEEA to plan and operate such Manpower Availability Conference; admits that one of the purposes of such Manpower Availability Conference was to facilitate SPEEA's members in obtaining employment as engineers with companies other than respondent, but denies all other allegations in such paragraph VIII, and particularly denies that Pearson was discharged because of his membership in SPEEA or because of any identification of such Manpower Availability Conference as an activity of SPEEA.

IX.

Answering paragraph IX of the complaint:

Respondent admits that it offered reemployment to Pearson on or about March 2, 1953, by a letter bearing that date, and alleges that Pearson accepted reemployment with respondent on or about March 17, 1953. Respondent alleges that such reemployment was to Pearson's former position with restoration, as of the date of discharge, of Company Service and other employee benefits incident to Pearson's prior employment by respondent. Respondent is informed that Pearson was employed by SPEEA throughout the period during which he was not in

respondent's employ. Respondent further admits and alleges that in such letter it reaffirmed its position concerning the Manpower Availability Conference. The allegations of paragraph IX of the complaint are otherwise denied.

X.

The allegations contained in paragraph X of the complaint are admitted, except that, as to the references to paragraph VIII of the complaint, such admission is subject to the denials in paragraph VIII hereof. Respondent further alleges that shortly after Pearson's discharge SPEEA requested a conference on the matter of such discharge and pursuant to such request several conferences with SPEEA representatives occurred in which the matter of Pearson's discharge and the respective positions of the parties in respect thereof were fully discussed. Pearson was present at the first of these conferences.

XI.

Answering paragraph XI of the complaint:

Respondent admits that on or about March 12, 1953 it unilaterally put into effect wage increases for the employees in the unit referred to in paragraph IV of the complaint (subject to the allegations in paragraph IV as to the classifications Facilities Engineer "A" and Facilities Engineer "B"), which increases were less than those demanded by SPEEA, after first having discussed such increases with SPEEA and after having given notice thereof to SPEEA.

XII.

The allegations contained in paragraph XII of the complaint are denied.

XIII.

The allegations contained in paragraph XIII of the complaint are denied.

XIV.

The allegations contained in paragraph XIV of the complaint are denied.

XV.

The allegations contained in paragraph XV of the complaint are denied.

XVI.

The allegations contained in paragraph XVI of the complaint are denied.

Further Grounds of Defense

For further grounds of defense, respondent charges that SPEEA, through its officers and agents, has refused to bargain collectively in good faith with respondent, in violation of Section 8(b)(3) of the Act, to the extent that SPEEA organized, promoted and operated the Manpower Availability Conference, to which reference is made in the complaint, and conducted activities relating to such Manpower Availability Conference, as a threat of economic action against and damage to respondent, in pressing the demands of SPEEA in the collective bargaining negotiations between the parties.

Wherefore, respondent requests that the com-

plaint in the above entitled proceedings be dismissed.

BOEING AIRPLANE COMPANY,
a corporation,
/s/ By A. F. LOGAN,
Its Vice President and duly authorized agent.
Respondent. 7755 East Marginal Way, Seattle, Washington.

Duly Verified.

Affidavit of Service by Mail attached.

[Title of Board and Cause.]

ORDER DESIGNATING TRIAL EXAMINER

It Is Hereby Ordered that Maurice M. Miller act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations of the National Labor Relations Board.

Dated: June 23, 1953.

[Seal] /s/ WILLIAM E. SPENCER,
Associate Chief Trial Examiner

[Title of Board and Cause.]

ORDER

After a hearing held in the above-entitled matter at Seattle, Washington, counsel for the Respondent presented a motion that the transcript of the testi-

mony in the case be corrected in certain respects to eliminate typographical and other errors. The General Counsel's representative has filed no objections to the Motion. An independent examination of the transcript and the suggested corrections establishes that correction of the transcript in the respects indicated would be appropriate.[1]

It is Ordered, therefore, that the transcript be, and it hereby is, corrected in accordance with the list attached to this order.

Dated: November 10, 1953.

/s/ MAURICE M. MILLER,
Trial Examiner

* * * * *

[Title of Board and Cause.]

ORDER TRANSFERRING CASE TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report and Recommended Order of the said Trial Examiner, a copy of which is an-

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[1] At five points in the list of corrections attached, the Trial Examiner, on the basis of his independent examination of the record, has determined that correction of the record would require an entry different from that suggested by the Respondent's counsel. Changes in the transcript ordered on the basis of the Trial Examiner's examination will be marked with an asterisk.

nexed hereto, having been filed with the Board in Washington, D. C.

It Is Hereby Ordered, pursuant to Section 102.45 of National Labor Relations Board Rules and Regulations that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., December 28, 1953.

By direction of the Board:

/s/ FRANK M. KLEILER,
Executive Secretary

* * * * *

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Messrs. Paul E. Weil and Robert Tillman, for the General Counsel.

Messrs. DeForest Perkins and William M. Holman, of Holman, Mickelwait, Marion, Black and Perkins, of Seattle, Wash., for the Respondent.

Mr. Jack R. Cluck, of Seattle, Wash., for the Union.

Before: Maurice M. Miller, Trial Examiner.

Statement of the Case

After an investigation of a charge and amended charge duly filed by the Seattle Professional Engi-

neering Employees Association, designated in this Intermediate Report as SPEEA or alternatively as the Union, the General Counsel of the National Labor Relations Board, in the name of the Board, caused the Regional Director of its Nineteenth Region at Seattle, Washington, to issue a complaint on June 3, 1953, in which Boeing Airplane Company, Seattle Division, was named as a respondent employer. The complaint alleged that the Respondent engaged and has continued to engage in unfair labor practices affecting commerce, within the meanin of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the National Labor Relations Act, 49 Stat. 449, as amended and reenacted by the Labor Management Relations Act, 1947, 61 Stat. 136, designated herein as the Act. Copies of the charge, the amended charge, the complaint, and a notice of hearing were duly served upon the Respondent and the Union.

With respect to the unfair labor practices the complaint, as amended in certain minor respects, alleged in substance: (1) that the Union is now, and has been since August 31, 1951, at least, recognized by the Respondent as the exclusive collective bargaining representative of a majority of its employees in a defined unit appropriate for the purposes of a collective bargain; (2) that the Respondent and the Union on or about April 7, 1952—pursuant to a notice given by the Union under the terms of a contract then current—initiated negotiations for a new agreement; (3) that the Respondent and the Union have been unable to reach

agreement in the negotiations conducted thereafter; (4) that the Respondent on or about January 27, 1953—during the pendency of the negotiations with the Union—discharged Charles Robert Pearson because of his Union membership and activities and because of his participation in certain specified concerted activities calculated to break the impasse in the contractual negotiations; (5) that the Respondent—by its discharge of Pearson because of his participation in a concerted activity designed to strengthen the Union's position in contractual negotiations, its refusal to permit Pearson to be represented by Union spokesmen in a conference immediately prior to his discharge, and its affirmation of determined opposition to the particular type of concerted activity in which Pearson had engaged at the Union's direction—failed and refused to bargain in good faith with the Union as the representative of its employees; (6) that the Respondent, on or about March 12, 1953, unilaterally made a wage increase effective for the employees in the unit for which the Union is the recognized representative, and thereby additionally failed and refused to bargain with the Union in good faith; and (7) that the Respondent's course of conduct, as described, involved unfair labor practices affecting commerce within the meaning of the Act as amended.

The Respondent's answer, duly filed, admitted the jurisdictional allegations of the complaint and the status of the Union as a labor organization, but denied the commission of any unfair labor prac-

tices. Specifically, the Respondent admitted the appropriateness of the unit, described in the amended complaint, for the purposes of a collective bargain, and it admitted recognition of the Union at all times since May 8, 1946, approximately, as the exclusive representative of employees in a unit substantially identical with that described in the complaint. The firm's answer also admitted the execution of a contract with the Union in 1951 and its participation in negotiations for a new agreement initiated in April of 1952 by that organization. It admitted the failure of the parties to reach an agreement as of the date of the complaint. The Respondent, in its answer, admitted certain factual allegations with respect to Pearson's discharge, but denied particularly, that the discharge was effected because of Pearson's membership in the Union or because of any identification of the activities in which he engaged as Union activities. The Respondent denied that its course of conduct with respect to the discharge and subsequent reemployment of Pearson involved a refusal to bargain; insofar as the wage increases of March 12, 1953, are concerned, the answer admitted unilateral effectuation of the increases, but asserted that they were less than the increases demanded by the Union, and that they were made effective only after proper notice and discussion with the labor organization.

As a further ground of defense, the Respondent alleged that the Union had refused to bargain collectively in good faith with the Respondent, in violation of Section 8 (b) (3) of the statute, in that it

had organized, promoted, and operated a "Manpower Availability Conference" as described in the complaint, and engaged in certain activities related to such a conference as a threat of economic action against the Respondent, in pressing its collective bargaining demands.

In accordance with the notice already cited, a hearing was held before me, as a duly designated trial examiner, at Seattle, Washington, between June 23 and June 25, 1953, both dates inclusive. The General Counsel, the Respondent, and the Union were represented by attorneys. All the parties were afforded a full opportunity to participate, to be heard, and to introduce evidence pertinent to the issues.

At the outset of the case, the General Counsel moved to amend the complaint in certain minor particulars; these motions were granted without objection. Certain rulings with respect to the admissibility of evidence were announced at the hearing; these rulings are hereby affirmed. At the close of the testimony, also, each of the parties argued orally; their argument has been embodied in the stenographic transcript. Pursuant to appropriate notice given at the hearing, briefs have been received from the Respondent and the charging labor organization. No brief has been received, however, from the General Counsel's representative.

Findings of Fact

Upon the entire record in the case, and upon my

observation of the witnesses, I make the following findings of fact.

I. The Business of the Respondent.

The Respondent is a Delaware corporation, which maintains its principal office at Seattle, Washington. The firm operates plants in Wichita, Kansas, and in Seattle and Renton, Washington, at which it is engaged in the manufacture of aircraft and aircraft parts. In the course and conduct of its business, and at all material times, the Respondent has purchased for use in its Seattle and Renton plants, materials, supplies, and equipment originating outside of the State of Washington valued in excess of $1,000,000 annually; it manufactures and sells to agencies of the United States government and to operators of commercial airlines, aircraft and aircraft parts valued in excess of $1,000,000 per year.

The Respondent makes no contention that it is not involved in commerce and business activities which affect commerce, within the meaning of those terms as defined in the Act. See Boeing Airplane Company, 103 NLRB No. 115, 31 LRRM 1610. I find that it is engaged in such activities, and that assertion of the Board's jurisdiction would effectuate the objectives of the statute.

II. The Labor Organization

The Seattle Professional Engineering Employees Association is, and at all material times has been, a labor organization within the meaning of Section

2 (5) of the Act, which admits employees of the Respondent to membership.

III. The Unfair Labor Practices

The Facts

A. Preliminary Statement.

All of the relevant evidence with respect to the issue involved in this case is embodied in documentary material or substantially undisputed testimony. I am entirely satisfied that any conflicts revealed in the record are due to differences of recollection. And since none of them appear to involve significant factual questions, I have undertaken to present the relevant data in narrative form without reference to the testimony of any particular witness—except to the extent that such references may be necessary, if at all, in connection with my narrative summation.

B. The Contractual Negotiations.

In 1946, after a consent election, the Union was "certified" as the exclusive representative of certain employees in the Respondent's Engineering Division. Since its certification, the Union has executed several contracts; there have been no work stoppages incidental to any of the negotiations. Approximately 3500 employees were at work for the Respondent, throughout the period with which this case is concerned, within the SPEEA unit.

On April 2, 1952, in a letter to the Respondent, SPEEA notified the latter of its desire to amend the 1951 agreement between the parties, by the negotiation of certain changes in relation to wages,

salaries and overtime compensation. In its letter, SPEEA described the changes as:

> * * * changes which we feel are necessary to improve the morale of the Engineering Division and to establish the engineer in his proper place in relation to the rest of society with regard to his salary and working conditions.

The letter indicated that other subjects might be brought up during the course of negotiations, however.

On the following day, A. F. Logan, Vice President in charge of Industrial Relations for the Respondent, at its Seattle Division, acknowledged the receipt of SPEEA's letter by the firm and indicated that its representatives would be available to meet the Union's committee on April 7, 1952.

A number of meetings were held thereafter. SPEEA appears to have requested wage and salary increases for various classifications in the Engineering Division which ranged from 28 percent to 36 percent of the then current wage and salary levels. On June 27, 1952, in a letter to E. M. Gardiner, the Chairman of SPEEA's Executive Committee, Vice President Logan reported that the Respondent would be willing to increase the "base salary rate" of each employee covered by the firm's agreement with the Union by 6 percent, and to increase all minimum and maximum rates established by the agreement in the same percentage. Vice President Logan also presented a company offer with respect to overtime compensation. The Respondent offered to make each of these suggested adjustments effec-

tive as of July 1, 1952, if the Union accepted its offer within 60 days. In a reply letter, dated on July 10, 1952, SPEEA rejected the offer. Further negotiations revealed that an impasse had been reached.

Thereafter, in August and September of 1952, the parties met on several occasions with a representative of the Federal Mediation and Conciliation Service. At the suggestion of the Federal Conciliator, apparently, SPEEA representatives raised for consideration a number of additional matters with respect to which they wished to negotiate contractual changes. On August 25, 1952, in a letter to Vice President Logan, these proposals were formalized.

> (A detailed analysis of the Union's "Second Contract Agreement Proposal" would not appear to be required, except to note that the Union modified its request for a base pay raise and called for a 13.5% increase for all of the employees in SPEEA classifications, retroactive to the first of July. The other subjects covered in the proposal involved such matters as overtime, merit raises, incentive pay, pensions, installation of an engineering efficiency system, removal of time clocks, salary data, sick leave, and company recognition of the Union's "area representative" system—which appears to be roughly comparable to the shop steward arrangement common in conventional labor organizations).

The revised proposals were described by the Union's

executive committee as "equitable and practical" in view of the discussions held with Company representatives since the inception of negotiations.

In the meantime on or about August 21, 1952, pursuant to notice previously given, the amended 1951 agreement between the Respondent and the Union had been automatically terminated. Each of the parties to the agreement, however, in an exchange of correspondence, had declared its readiness to continue negotiations for a new agreement. Such negotiations, as we shall see, did in fact continue—and the conditions established under the expired contract have been maintained, with one exception to be noted, up to date.

In the course of the conferences, previously noted, before the Federal Conciliator, the impasse in negotiations seems to have disappeared. In any event, the Respondent's first formal reply to SPEEA's "Second Contract Agreement Proposal," as embodied in a letter dated on September 3, 1952, presented a modified proposal with respect to sick leave. Vice President Logan, however, closed the letter with the observation that:

> In all other particulars, a review of the whole situation as it is apparent to us, including recent developments in negotiation, has not led us further to modify our previous offer.

The parties last met with a Federal Conciliator on September 11, 1952; thereafter, apparently in the hope and expectation that the impasse had been broken, the parties dispensed with the Conciliator's services and resumed direct negotiations.

C. The Manpower Availability Conference.

During the negotiations for the 1951 agreement previously noted, at a time not set forth specifically in the record, the Executive Committee of the Union appears to have organized an Action Committee, so-called, specifically designated to originate and formulate plans for various types of Union action short of a strike, calculated to focus economic pressures upon the Respondent and thus to strengthen the Union's position in the negotiations. The record shows that this committee suggested several courses of action calculated to bring pressure upon the respondent company; among the suggestions was one that SPEEA organize and conduct a Manpower Availability Conference for the benefit of any Boeing engineers who might wish to seek employment elsewhere.

> (The exact nature and significance of the suggestion with respect to a conference—with which this case is immediately concerned—will be set forth elsewhere in this report).

Since the executive officials of the Union expected that a new agreement with the Respondent would be executed shortly, and since such an agreement later did in fact materialize, the suggestion with respect to a Manpower Availability Conference was never elaborated.

In August of 1952, however, while the negotiations for a new agreement were being held under the guidance of a Federal Conciliator, the Chairman of the Action Committee resubmitted the suggestion, among others, to a meeting of SPEEA area

representatives shortly before a scheduled general membership meeting; thereafter, I find, it was discussed informally by the area representatives and members of the Executive Committee of the organization.

At SPEEA's August membership meeting, the conference was cited in an Action Committee report as one of the several courses of action calculated to focus economic pressure upon the Respondent. A majority of the members at the meeting—which appears to have been held on August 4, 1952—approved the Committee's report and directed the Executive Committee of the organization to publish it for the information of the membership. This was done, and the report appears to have been distributed shortly thereafter. With the approved report on the Manpower Availability Conference, the Executive Committee distributed a ballot calculated to secure an expression from the membership as to its willingness to participate in a conference of the type outlined. The report indicated that it was being submitted to determine whether or not the membership desired to initiate "punitive action" of the type indicated, at the time. In pertinent part, the report read as follows

Introduction

The Manpower Availability Conference is conceived as a "market place" where Engineers who seek more desirable employment can meet with Companies which seek to hire more Engineers. There are three major reasons for sponsoring such a conference; namely, to help those Engineers de-

siring to move to obtain the best competitive offer, to help to discover the true market price for Engineers, and as a punitive action to reduce the Engineering services available to Boeing.

General Plan

First, signatures of Engineers who pledge themselves to attend such a conference will be obtained through the Area Representatives. A few items of personal data, such as years of experience, will also be obtained for submission to the invited Companies to serve as an inducement. Area Representatives will keep this information confidential. If membership response is favorable, a letter will be written and mailed to every Company we know of in the country which employs Engineers. Perhaps ads could be inserted in the "Positions Available" columns of newspapers in a number of leading cities, inviting inquiries of SPEEA. Next, a date would be set for the conference and arrangements made for the interviews with those Companies who accept our invitation. After the conference, each Engineer who was interviewed would be asked to drop a card bearing his present salary and the increase offered into a box. This information would then be summarized and circulated to all Boeing Engineers. A summary of the experience of persons hired by the participating Companies could be made and circulated to all of the other Companies on our mailing list. It is expected that this information would excite the interest of both groups. Another conference could then be called and the procedure repeated. This con-

ference should be sufficiently unusual to be newsworthy and could thus aspire to considerable free publicity. This publicity in turn would have a further punitive action to discourage new hires from coming to Boeing.

A number of questions may arise. First, "What if the Conference doesn't work?" There is little purpose in conjecturing about success of this item. If only ten Engineers pledge to attend or if only one Company accepts our invitation, the conference will obviously fall far short of expectations and might be called off. All we would have lost in that eventuality would be some work and printing cost. We will never know for sure, though, unless we try. As a point of interest, however, several Companies have been sounded out and they all have indicated unofficially that they desire to be included. Second, "Is it ethical?" There is nothing unethical about providing a time and a place for these two groups to get together. After all, it is Boeing policies which provide the impetus for a change, not SPEEA. Anyway, Boeing has set the ethical standard with their Gentlemen's Agreement. Third, "Won't the Gentlemen's Agreement of the Aircraft Industries Association be a hinderance?" Possibly, but we have a method which might get around that for some Engineers, namely, expressing willingness to AIA members to notify Boeing in advance of plans to seek employment elsewhere. At any rate, we might be surprised at the variety of Companies who are sufficiently interested in our qualifications to make attractive offers. Fourth question, "What if the

Company finds out about the Conference?" It would be our intention that they find out well in advance, when some invited Companies send them our letter, if they haven't learned of it sooner by word of mouth * * *

The so-called "Gentlemen's Agreement" of the Aircraft Industries Association, to which reference is made in the above-quoted report, refers to a resolution adopted by the Aircraft Industries Association with respect to the practices of member companies in connection with their engineer recruitment programs. Insofar as it may be material, the "agreement" and the Respondent's interpretation of it will be discussed elsewhere in this report.

Late in September or early in October of 1952 the results of the ballot or "pledge" circulated to the SPEEA membership in connection with the Conference report were announced. There were 871 replies from approximately 2100 members in the Respondent's employ. The replies were distributed as follows:

Pledge	No.	Percentage of Replies
1. I pledge to attend this conference, I desire to change Companies, and I authorize the Executive Committee to notify Boeing of my intention not more than two weeks prior to the conference	10	1.5
2. I pledge to attend this conference and I desire to change Companies, but I desire not to disclose my intention to Boeing	86	9.86
3. I pledge to attend this conference. but do not necessarily desire to change Companies at this time	420	48.28

Pledge	No.	Percentage of Replies
4. I am willing that the conference be conducted, but I will not participate	321	36.82
5. I desire that no conference be conducted	34	3.89

Prior to the receipt of these pledges, the Executive Committee had appointed a special Manpower Availability Conference Committee to develop detailed plans for the indicated conference, and to initiate such a conference if necessary. Charles Robert Pearson, an engineering designer in the Respondent's employ, had been named as committee chairman.

> (For convenience, the Manpower Availability Conference will be designated hereafter in this report as the MAC, and Pearson's committee will be designated as the MAC Committee.)

The executive Committee of the Union requested the MAC Committee to perfect its plans for an MAC, but to undertake no action implementing such plans which might jeopardize current negotiations for a new contract. Some time in September or October of 1952, after the results of the ballot previously noted were tabulated, SPEEA's Executive Committee notified the Respondent of the results at a bargaining conference; the Respondent's representatives were informed however that since the negotiations appeared to be going well, no action with respect to the MAC would be taken by the Union, for at least four weeks.

> (According to Edward M. Gardiner, then Chairman of the Union's Executive Committee,

this information was communicated to the Respondent on or about September 29, 1952.)

Pursuant to the instructions of the Executive Committee the MAC Committee organized a number of sub-committees and proceeded to formulate detailed plans for the conduct of the projected conference. As of October 17, 1952, the sub-committees would appear to have been organized, and their responsibilities assigned.

(Participation in the MAC, as planned, was to be limited to SPEEA members in the Respondent's employ. The Union had some members employed at the Continental Can Company, but they appear to have been employed under a trade agreement still in effect.)

D. Further Contractual Negotiations.

In a letter dated on November 20, 1952, addressed to the Union, the Respondent stated its "ultimate position" with respect to the various issues under negotiation. With respect to "base salary rates and rate ranges" the Respondent reiterated its previous offer of a 6 percent increase across-the-board effective as of July 1, 1952.

(Chairman Gardiner of SPEEA testified, however, that the Respondent, dehors the contract, indicated its intent to initiate a program of merit increases twice a year, instead of only once a year as formerly, and to increase its fund for merit increases from 3 percent to 6 percent of the unit payroll.)

The Company also proposed a revision in the method of computation to be used in the calculation

of hourly rates of pay for scheduled overtime work on the part of employees in the firm's so-called "exempt" classifications, the revision to be effective January 2, 1953.

(Chairman Gardiner, as a witness, characterized this proposal as less favorable than the Respondent's offer with respect to overtime compensation in July of 1952. As of that time, Gardiner reported, the Respondent had offered to pay for overtime work on a revised basis, retroactive to the first of the month; the Respondent's "ultimate position" however, as noted, limited such retroactivity to the 6 percent increase in base salary rates and rate ranges.)

The Respondent concurred in SPEEA's proposal with respect to a sick leave clause, and countered various Union proposals with respect to the improvement of efficiency in the utilization of engineers with a proposal that the firm's job classification structure be revised in certain specified respects.

Except in the particular respects noted, the Respondent proposed execution of a contract which would embody terms and provisions "similar" to those in the previous agreement between the parties.

(The letter in which the Respondent stated its ultimate position also included certain statements and commitments with respect to various issues raised in the Union's second contractual proposal; these covered such matters as merit increases, incentive compensation, pensions, sal-

ary data, and company recognition of the Union's "area representative" system. In the context of the present case, however, none of these issues would appear to be material.)

The Respondent's offer, as described, was subsequently rejected by the Union membership, in a formal referendum. In a letter dated December 20, 1952, Chairman Gardiner formally communicated this information to Vice President Logan; he expressed the "expectation" however that negotiations between the Union and the Respondent would continue.

E. The Respondent's Proposal to Revise Salary Rates and Rate Ranges Unilaterally.

On December 26, 1952, the Respondent acknowledged SPEEA's letter of the 20th. The letter referred to SPEEA's expressed expectations that negotiations with the Company would continue and went on to say that:

> * * * you may be assured that the Company also intends the continuance of such negotiations to the end that a new contract may be consummated between the parties, and will extend the fullest cooperation in arranging mutually convenient meetings for this purpose.

The Union was advised however that there were, in the opinion of the Respondent, "compelling reasons" why its proposals with respect to salary rates and overtime compensation should be placed in effect as soon as possible. In this connection, the Respondent's letter continued as follows:

It is recognized that the action designated * * * is less than you have demanded, and it is assumed that your demands, to the extent that they are not met by such action, will be among the subjects of further negotiation. The proposed action would be completely without prejudice to such further negotiations or to your position in respect of such negotiations.

However it is felt by the Company that such action should be taken as to the employees represented by your organization as soon as the necessary governmental approvals can be obtained, for the reasons that bargaining in respect of a new contract has extended over a period of many months, without agreement having been reached; that it appears that there is no immediate possibility of reaching any mutual agreement short of granting all or substantially all of your demands—which the Company is unwilling to do; that such action is desirable and equitable in view of the effective or contemplated increases to other Company employees; and that the Company's competitive hiring position compels such action.

The Company indicated a desire to discuss the matter, and suggested a conference at a fixed date.

On January 5, 1953, subsequent to the conference date suggested on behalf of the Respondent, Chairman Gardiner acknowledged the Respondent's statement of its intention to apply unilaterally for Wage Stabilization Board and Air Force approval with respect to its proposed changes in base salary rates and overtime compensation. Vice President

Logan was advised that SPEEA would file an objection to any such proposal with the Wage Stabilization Board and that it would file an unfair labor practice charge with the National Labor Relations Board. On the 7th of January the Respondent, in reply, advised the Union that:

Certainly no disparagement of your organization or of the negotiations being conducted by your organization is either intended, or would result from such increases inasmuch as the proposed action is less than you have demanded and it is a fact well known to your members that you have not withdrawn your overall demands but are continuing to press them. Further, as we have stated several times previously, the proposed action is completely without prejudice to your demands and further bargaining in respect of them, and the Company is ready to meet with you at any time for such purpose.

The proposed increases are not conditioned in any way upon withdrawal of your demands. Thus, it would seem the proposed action should be regarded as mutually advantageous to your organization, to the employees it represents, and to the Company; would be consistent with and in no way prejudicial to good faith bargaining; and on the contrary would amount to a constructive step in the bargaining process.

A statement as to the reasons for the Union's objection to the Company's proposed unilateral action was invited. The Union's reply, however, was somewhat delayed. On February 6, 1953—after a series

of events to be set forth elsewhere in this report—Gardiner, as the spokesman for the organization, advised the Respondent that:

It is our view that the proposed increases are so timed and planned that their effect would be to hamper SPEEA in the performance of its functions as a collective bargaining agency. Implicit in your letter is the view that the pending negotiations must be protracted, and that the increases you propose should be accepted because they can be made promptly. We take the view that the dispute as a whole can, and should be settled promptly; that the effect of any such partial adjustments in compensation would serve to delay rather than hasten completion of the pending negotiations.

Previously—as early as January 22, 1953, I find—Vice President Logan had called Chairman Gardiner to ask if SPEEA would reconsider its previous refusal to join the Company in an application to the WSB for approval of the 6 per cent increase. He had even offered, I find, to let SPEEA take credit for the increase as a partial satisfaction of its demands, and had assured Gardiner that the proposal involved no effort to embarrass the Union or impede the negotiations. Gardiner's reply, the record shows, had been negative.

F. The Organization of the Manpower Availability Conference.

Late in December of 1952, presumably at or about the time of the rejection by the SPEEA membership of the Respondent's final offer, Chairman Pearson of the MAC Committee had been in-

structed to effectuate the committee's plans, previously drafted, with respect to the conduct of a Manpower Availability Conference. Specifically, Pearson's testimony shows, he was instructed to secure a local city license to conduct an employment agency.

(This action appears to have been taken—despite the belief of the committee members that the MAC, as projected, would not fall within the scope of the Seattle city ordinance with respect to the licensing of employment agencies—in order to avoid any possible question as to the applicability of the ordinance.)

Early in January of 1953, Pearson sought and secured the suggested employment agency license. At or about the same time his draft of a letter of invitation to the MAC, prepared for transmittal to approximately 2800 employers of engineers throughout the country, was approved by the Union's Executive Committee. On a date not set forth clearly in the record, shortly after the 14th or 15th of January, 1953, the invitations were sent; they were printed on the letterhead of SPEEA and went out over the facsimile signature of Chas. Robt. Pearson, Director Manpower Availability Service (Licensed and Bonded Employment Agent).

(A copy of the letter, as sent, will be found attached to this Intermediate Report and Recommended Order as an appendix.)

A copy of the letter of invitation was sent to the Respondent. In a covering letter addressed to Vice President Logan—which the Respondent appears

to have received on January 23, 1953—Chairman Gardiner summarized the purposes for which the MAC would be held. His letter read as follows:

Dear Sir:

1. This is to advise you that SPEEA has started and will complete a Manpower Availability Conference.

2. Various companies are to be invited to come to Seattle to interview those SPEEA members who have expressed a desire to entertain offers of employment.

3. This conference is being conducted for the following purposes:

(a) To provide members with improved opportunities to bargain for their services. Our membership has requested SPEEA to restore the freedom and privacy of engineers who seek to improve their situations by changing employers.

(b) To obtain data on the true market value of engineers with various amounts of experience.

4. In offering this service to its members, SPEEA has retained an agency for bringing together those engineers and companies who may care to discuss employment possibilities. SPEEA offers no special inducement to engineers to terminate, nor does it enter in any way into negotiations between the companies and the engineers.

The testimony of Vice President Logan indicates that he had no idea, upon receipt of the above letter, as to the identity of the "agency" which SPEEA had retained to "bring together" interested engineers and companies which might care to dis-

cuss employment possibilities. He also testified that he had never previously heard of Pearson, that he was unaware of Pearson's employment by the Respondent as an engineer, and that he had no reason to connect Pearson with the "agency" previously noted. I credit this testimony. When told that Pearson was a Boeing engineer, and that he was then out of the city in connection with the Respondent's business, Logan ordered him recalled for a conference.

G. The Discharge of Charles Robert Pearson.

On January 27, 1953, pursuant to instructions, Pearson reported at the Respondent's plant. After a slight delay, he was conducted to the office of Vice President Logan. The latter indicated that he wished to discuss the letter of invitation to the MAC signed by Pearson as a licensed and bonded employment agent, as forwarded to the Respondent by Chairman Gardiner. In response to a direct inquiry, Pearson admitted that the facsimile signature on the letter was his own. When asked if he was a "licensed and bonded employment agent" however, Pearson declared that the question directly concerned his activities in behalf of SPEEA; he therefore insisted that he would be unable to discuss the matter further unless "appropriate members" of the SPEEA Executive Committee could be present. Although pressed to give a reply, Pearson insisted that the matter at issue concerned his legitimate union activities only, and could not be continued on a personal basis. Logan, however, insisted that the matter had nothing to do with SPEEA, or Pearson's membership in it, or his

activities in its behalf. He renewed his inquiry as to whether Pearson was a licensed and bonded employment agent, stating that, if this were the case, he had some suggestions to make. Pearson, however, insisted that since "any and all employment agency activities" in which he might be engaged were on behalf of SPEEA, the question involved a SPEEA matter and should be handled as such, rather than as a personal inquisition; he inquired as to whether Logan intended to call in the responsible SPEEA officials. Vice President Logan denied that the conference was either an inquisition or personal; he described it only as an attempt to get "some facts" from the employee.

> (Up to this point, the conversation had been punctuated by the efforts of Pearson to take notes, and to reduce his own comments to written form before each reply. At or about the point indicated above, however, Logan called in a secretary and had stenographic notes made with respect to the balance of the conference. No substantial conflict is revealed in the record with respect to the accuracy of Pearson's notes and I have, thus far, relied upon them. My findings with respect to the balance of the conversation in Vice President Logan's office, however, will be based upon the transcribed notes of his stenographer.)

Vice President Logan continued to insist that his inquiry had nothing to do with Pearson's membership in SPEEA or his activity in its behalf. As the record shows, he went on to say that:

* * * I am interested rather in whether you are or are not a licensed and bonded employment agent. Furthermore, I am interested in whether you are or are not working as an employment agent at this time * * * It is our belief that in the absence of any information from you and your refusal to give us any information with respect to your alleged activities as an employment agent we can make a reasonable assumption that the allegations are true. You have had reasonable opportunity to inform us otherwise if such were the case. We do not believe that you can do justice to such activities and your work as an employee of Boeing when carried on simultaneously. And, therefore, the suggestion which I had intended to make and now make is that you elect to give up one or the other of these activities. We do not propose that you shall proceed to carry both of them out * * *

Pearson reiterated his contention that the discussion could not be continued until appropriate Union representatives were present, and he refused to acknowledge Logan's comments as related to anything other than "direct" SPEEA business. Logan replied that:

You have had your chance to make your choice, and it is obvious you have no intention to do that, so that places us in the position where we have to make our own decision as to which of these activities; namely, the operation of an employment agency or your assigned work as a Boeing employee are going to be paramount in your mind. We will, therefore, make the decision that your work as an

employee at Boeing would be entirely too greatly impaired by your outside activities as an employment agent, and we are therefore unwilling to permit you to continue such activities and remain in our employ. Our decision for the reasons stated is that you are being terminated forthwith.

Pearson observed in reply that the timing of the Respondent's action was definitely connected with SPEEA's release of the Manpower Availability Conference invitations, and that his discharge could only be interpreted as a retaliatory action against SPEEA and discrimination against him in retaliation for his legitimate Union activities. He demanded that the Respondent's action be "dropped" and that appropriate Union officers be present at any further discussion of it. Vice President Logan rejected Pearson's statement as to the implications of his action, and closed the discussion.

In due course, Pearson received official notice that his employment had been terminated. The notice indicated that he had been dismissed for refusal to answer questions relative to his outside activities as an employment agent.

On the afternoon of the 27th, after his departure from the plant, Pearson attended a meeting of SPEEA's Executive Committee to discuss his discharge. A letter appears to have been dispatched immediately to the Respondent, requesting a conference on the subject of Pearson's termination. On January 29, 1953, Vice President Logan, on behalf of the Respondent, indicated willingness to arrange such a conference promptly.

(In the meantime, Pearson had received and accepted an offer of employment by SPEEA, as a member of its office staff, in order to enable him to maintain his income.)

A conference was held on February 6, 1953. The SPEEA representatives contended that Pearson had been engaged in SPEEA activities as a Union member, and that he had been unjustly terminated. They also expressed the opinion that his termination had been due to a misunderstanding; that Vice President Logan had genuinely desired to determine why Pearson had acted as he did; that Pearson had considered the subject under discussion as one of direct concern to SPEEA and thus had refused to discuss it in the absence of SPEEA representatives; and that Logan, because of his conception as to the purpose of the conference, had felt that the presence of SPEEA's representatives would not be required. In reply to this statement of the Union's position, at the conference on the 6th of February, Logan indicated that he had no objections to the attendance of SPEEA representatives, as requested by Pearson, at a second conference. On or about February 9, 1953, such a conference was held.

(There is some doubt as to whether Pearson attended the conference. His own testimony would indicate that he did not. Chairman Gardiner's testimony would indicate otherwise. The conflict is a minor one, however; I find its resolution unnecessary.)

Logan reiterated the questions he had directed to Pearson, and stated the Respondent's position with respect to the propriety of the latter's actions. The Union's view, with respect to the propriety of Pearson's conduct was stated in reply. A general discussion ensued and, in summation, Vice President Logan said that the Respondent would send a letter to Pearson restating its position.

Such a letter was dispatched by the Respondent on February 11, 1953. After a reference to the Union's request for a "more particularized statement" as the Respondent's reason for his termination, and a repetition of the reason given on his termination slip, Vice President Logan restated the Respondent's opinion that the entry on Pearson's termination slip correctly summarized the position taken by him at the January 27 conference, at which he had been informed of the reason for his termination. In response to SPEEA's request however, the letter was offered as a "review" of the matter. It reviewed the receipt of the Manpower Availability Conference invitation and Chairman Gardiner's covering letter, and went on to say that:

It was clearly apparent from this letter and invitation that SPEEA had started and intended to carry out a nation-wide solicitation of our business competitors, and others who compete with us in hiring engineers, in an effort to bring about a situation in which substantial numbers of engineers would leave the employ of this Company, for employment elsewhere.

It is obvious that even if there were an adequate supply of engineers at the present time, such a program would be against the best interests of Boeing Airplane Company. However, as you know, there is not an adequate supply of engineers at this time; the Company is in serious need of more engineers and has been conducting an extensive nation-wide advertising campaign designed to fill this need. Thus, the invitation signed by you is part of a deliberate program which is very damaging to the Company.

The letter recapitulated the Respondent's decision to recall Pearson for a conference with respect to the invitation letter, and the course of the discussion at that conference on the 27th of January. It continued as follows:

As your work in connection with the program is clearly against the best interests of the Company and in violation of your obligations as an employee, you were asked to elect either to give up your work as an employment agent or to leave the Company's employ. You refused to make such an election, leaving the Company no alternative but to terminate you.

It seems to us that while an employee continues at work, continues to draw salary from a company and is not on strike, it is no more than proper for that company to require that he do nothing intentionally which would have the effect of seriously damaging that company. On the other hand, it does not seem to us that an employer should be compelled to continue paying a salary to an employee who

engages in a deliberate program resulting in serious damage to the Company, whether or not his activities have been authorized or ratified by a collective bargaining organization of which he is a member.

For these reasons, your dismissal is considered proper.

On February 13, 1953, the SPEEA Executive Committee presented a revised contract proposal to the Respondent. With respect to base salary rates and rate ranges it proposed an increase of 9.7 per cent to the nearest dollar; in connection with this proposal, and a companion proposal with respect to the method of computation to be utilized in the determination of compensation for scheduled overtime, the Union proposed July 1, 1952, as a retroactive date. At the close of its letter, however, the Union advised the Respondent that:

It is the intention of the Executive Committee to recommend rejection of any offer made by the Boeing Airplane Company until such time as Mr. Charles Robert Pearson is reinstated unequivocally. Such reinstatement shall not be in any way contingent upon his relinquishing his prerogative of managing the SPEEA Manpower Availability Conference.

The Union's letter of invitation to the MAC, previously noted, had indicated that "commitments to attend" would be accepted by SPEEA up to February 6, 1953. Shortly after that date—which also marked the occasion of the first conference between the Union and the Respondent in regard to

Pearson's discharge, as noted—Chairman Gardiner informed James D. Esary, Jr., the Respondent's Labor Relations Manager, by telephone, that the Union had received only 12 replies, approximately, to its letter of invitation, and that the Union's plan to conduct an MAC in March had been abandoned.

> (The testimony of Pearson indicates that 18 letters were received, in toto—some of these being received after the deadline date set in the Union's letter of invitation. Some, Pearson testified, expressed interest; other replies indicated however, that the senders considered the distance to Seattle too great, or that they did not consider their needs serious enough to warrant participation.)

With this information at hand, Labor Relations Manager Esary dispatched a reply, dated on March 2, 1953, to the Union's revised contractual proposal.

In a second letter, on the same date, Labor Relations Manager Esary referred to SPEEA's indication, in its previous communication, that further contractual negotiations would be "fruitless" unless the Respondent reinstated Pearson. Esary advised the Union that:

> We are by this letter offering reemployment to Mr. Pearson to his former position as of the time he is available and returns to work * * *

The Labor Relations Manager, however, reiterated the Respondent's position that Pearson's discharge fell entirely outside the scope of the contractual

negotiations, but indicated that the Respondent did not wish to see any controversy of such a nature impair negotiations that directly affected a large number of engineers. His letter continued as follows:

Second, you have been very candid in stating to us the results of the Manpower Availability Conference, which as we understand it, did not attain the objectives for which it was intended. Mr. Pearson's termination has been reviewed in light of this fact and the fact that, to our knowledge, further activities in connection with this Conference are not anticipated. The offer to reemploy him is not to be interpreted as reflecting any different position on the part of the Company as to activities of this type conducted by those who are not on strike but continue to draw salary. We cannot consider it proper to believe that such an employee has the right to conduct such activities to the detriment of the Company.

At a conference on March 5, 1953, between representatives of SPEEA and the Respondent, Pearson's reemployment pursuant to the above-quoted offer was discussed. And on March 17, 1953, he was reinstated to his former position without prejudice, and with all of the rights and privileges acquired by him prior to his termination.

Further correspondence, in evidence, between the Respondent and SPEEA indicates a difference of opinion between the parties as to whether the restoration of Pearson's rights and privileges was the result of a "verbal agree-

ment," or a result of the Respondent's own initiative. In the light of the entire record, a resolution of this conflict would not appear to be essential to a disposition of the issues involved in the case; I have made no attempt, therefore, to reach a conclusion as to the basis on which Pearson's rights and privileges were restored.)

H. The Salary Increase.

On March 6, 1953, before Pearson's reinstatement had become effective, J. H. Goldie, Vice Chairman of SPEEA's Executive Committee, advised the Respondent's labor relations manager by letter that the Company's final offer—as outlined on November 20, 1952, and December 26, 1952, and reiterated on March 2, 1953—was again rejected. With respect to the Respondent's expressed intention to put into effect, unilaterally, the 6 per cent salary increase previously proposed and rejected, Labor Relations Manager Esary was advised that SPEEA's Executive Committee had agreed to poll the membership of the Union, in order to learn its desires with respect to the acceptance of such an "interim" offer, if the offer would include full retroactivity with respect to overtime payment computations as well as base salary rates. A reply, in this connection, was requested from the Respondent, if it had "any further suggestions" in the matter.

This communication was acknowledged by the Respondent in a letter dated March 12, 1953. It referred to the Union's position as an unqualified rejection of the Respondent's offer with respect to

basic salary rates, and went on to advise the Union that, for reasons previously stated, the Respondent felt compelled to make its proposed increases effective without prejudice to further negotiations, and that the adjustments previously outlined would be made effective forthwith. When the first paychecks which reflected the increase were distributed, they were accompanied by a notice from the Respondent to each employee in the SPEEA unit. That notice read as follows:

Notice

You will note that the enclosed check represents an increase in your pay of 6% as of March 13, 1953. On April 23, 1953, you will receive payment of the 6% increase in your base pay for the period July 1, 1952, through March 12, 1953, as well as any amount arising from an increase in the overtime compensation rate for "Exempt" classifications effective January 2, 1953. The new overtime rate for SPEEA "Exempt" employees is straight time plus $1.25 an hour where the base salary is above $100 a week, and time and one-half on all salaries of $100 a week or less. The former rate was straight time or $3.00 an hour whichever was the greater.

These increases have been placed into effect without a new contract having been signed with your collective bargaining, SPEEA. This is less than the increase requested during the course of current negotiations, and is being placed into effect by the Company without prejudice in any way to the pending negotiations between the Company and SPEEA.

Prior to placing these increases into effect SPEEA was advised and consulted, and SPEEA objected to the Company placing these increases into effect. The Company is hopeful of and looking forward to the execution of a collective bargaining agreement with SPEEA which will be mutually agreeable to the parties.

The nature of the subsequent negotiations between the parties is suggested in certain letters which have passed between representatives of the Respondent and Mr. F. D. Frajola, the new chairman of SPEEA's Executive Committee. As of the dates on which the hearings in this case were held no final agreement with respect to a new contract had been reached.

Conclusions

A. The Issues.

In this posture of the record, the General Counsel contends that Pearson, as chairman of the Manpower Availability Conference Committee, had been engaged in assistance to a labor organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection; so considered, it is argued, his activities fell within the ambit of those accorded statutory protection under the Act, as amended. The Respondent's action, therefore, in regard to the termination of his employment, is challenged as interference, restraint or coercion directed against its employees in connection with their exercise of rights statutorily guaranteed, and as discrimination in regard to his

tenure of employment and the terms and conditions of his employment, calculated to discourage membership in the Union, a labor organization.

The General Counsel also contends that Pearson's discharge was calculated to obstruct the organization of the Manpower Availability Conference, as planned, which the Union had developed to break a current impasse in the contractual negotiations. Although the General Counsel disclaims any intention to take a position with respect to the nature of the impasse, it is contended that the discharge of Pearson—calculated, as it was, to interfere with the operation of the projected conference—injected "bad faith" into the situation, and negated the existence of any good faith impasse at that time and thereafter. As a subsidiary contention, the General Counsel alleges that the Respondent's unwillingness to allow Pearson representation by the Union officials at the conference which preceded his discharge demonstrated its contempt for the Union and its intent to undermine that organization and render it ineffective as a contract negotiator. In this aspect of the case, therefore, the Respondent's discharge of Pearson is again challenged as evidence of the Respondent's bad faith, in connection with the contractual negotiations then current.

In the light of a situation, then, which the General Counsel describes as a "bad faith impasse," the unilateral salary increase which the Respondent put into effect in March, 1953, is challenged as additional evidence of a refusal to bargain in good faith, on the ground that it created a situation in

which the Union found itself unable to bargain effectively.

The Respondent's position, in opposition to these contentions, may be simply stated. It stands upon the proposition that the MAC, if successful, would have created a situation so fraught with the possibility of irreparable damage to the Company as to warrant its characterization as a type of concerted activity not entitled to statutory protection.

> (At one point, in oral argument, the Respondent's counsel suggested a possible contention that the organization of the MAC, as projected, would not have involved "concerted" activity, apparently on the ground that it would be calculated only to facilitate individual resignations from the Company's employ; this contention, however, was never fully articulated, and there is no indication that it constitutes a significant part of the Respondent's theory of the case. I have, therefore, given it no consideration.)

Pearson's activities as chairman of the MAC Committee, therefore, are characterized by the Respondent as indefensible and unworthy of statutory protection. In the alternative, the Union's attempt to organize the MAC is characterized as a pressure tactic so unfair as to deserve characterization as a Union unfair labor practice; if so, the Respondent contends, it should be held "unlawful" as contrary to statutory policy, and thus clearly beyond the ambit of statutory protection. Pearson was termi-

nated, the Respondent contends, because of his participation in an "unprotected" concerted activity. The Respondent denies that his termination involved interference, restraint or coercion, or discrimination with respect to his tenure of employment or the terms or conditions of his employment to discourage membership in the Union; and it denies, in addition, that his termination evidenced "bad faith" with respect to the contractual negotiations then in progress or that it injected an element of "bad faith" into the impasse then current with respect to basic salary rates and overtime compensation. In the light of that impasse the Respondent's unilateral action with respect to the salary adjustments previously noted should be characterized, the Respondent contends, as a matter of business necessity, and not as evidence of an improper refusal to bargain.

B. The Statutory Policy.

As the Board and the courts have frequently declared, the National Labor Relations Act, by its terms, established a number of restrictions on the common law right of employers to dismiss their employees at will—for any reason or for no reason at all. The heart of the statute, in this connection, is to be found in its 7th section, which defines the rights of employees, in pertinent part, as follows:

> Employees shall have the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *

The quoted language has been held to constitute a basic charter of employee rights. Decisional doctrine, however, has long since made it clear that the rights thus defined in the statute must be construed in the light of the Act's basic policies. In its statement with respect to these policies Congress has, among other things, declared that:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed. (Emphasis supplied)

Within the frame of reference established by the language quoted above, a rationale sufficient to justify disposition of the present case must be found.

C. Did the Manpower Availability Conference Involve a Concerted Activity?

Upon the entire record, there can be no doubt that the MAC was conceived as a device reasonably calculated to assist the Union, a labor organization; its stated objectives, as set forth in Pearson's testimony and in several communications to SPEEA members and the Respondent, were clearly intended to strengthen the position of the Union in the negotiations then current. I so find. And those

objectives—assistance to any engineers who might wish to change employers, discovery of the true "market price" for engineers, and reliance upon any resultant employee attrition as a pressure tactic —also clearly involved mutual aid and protection. Over and above any value such activities could be expected to have as a form of assistance to particular engineers who desired more lucrative employment elsewhere, the MAC was clearly intended to make possible a strong Union line in the current negotiations, for the anticipated benefit for those engineers who made no effort to leave.

Did the development of plans for the MAC involve a "concerted" activity, then? Clearly so. The original conception was developed by an officially designated Union committee. Upon the submission of the committee's report to the general membership, the suggestion with respect to a conference was overwhelmingly approved in a referendum—which appears to have been participated in by a substantial number of the organization's members.

> (The Respondent points out that of 3500 employees within the unit only 2100 were Union members at the time of the referendum; that only 871 members returned their referendum ballots—with results previously indicated—and that the MAC Committee was activated, in December, by the votes of a majority at a general membership meeting which only 182 members attended. Nevertheless, I do not believe that the referendum vote can be said as a matter of law, to be unrepresentative. There can be no

doubt that all 2100, approximately, of the SPEEA members could have voted; I find no real basis for any contention that the vote as recorded, did not reflect the desires of an interested, representative, cross-section of the membership. Even if it could be said, however, that the referendum results merely reflected the desires or intent of a minority, such a finding would not impair the validity of my conclusion—that the MAC involved a "concerted" activity, insofar as it reflected official SPEEA policy. It is so found.)

The actual conference plans were developed by a committee specifically designated for the purpose, responsible to the SPEEA Executive Committee. And Pearson, as the Chairman of the MAC Committee, appears to have maintained a close and constant liaison with responsible Union officials. Action to implement the Committee's plans appears to have been taken only after a favorable vote at the Union's membership meeting in December, and upon the specific direction of the organization's Executive Committee. There can be no doubt whatever that the MAC, as it developed, was officially sponsored by the Union, and that it represented a "concerted" activity within the meaning of that term as used in the statute. I so find.

D. Did the Manpower Availability Conference Involve a Protected Activity?

The unqualified language of the statute with respect to employee conduct entitled to protection has already been noted. And in some Board and

court decisions, under the original statute in particular, that language has been given wide scope. One of the more noteworthy decisions, upon which the General Counsel in the present case relies, finds expression in the language of Circuit Judge Learned Hand; in N.L.R.B. vs. Peter Cailler Kohler Swiss Chocolates Co. Inc., 130 F. 2d. 503 (C. A. 2) he declared that:

We agree that the Act does not excuse "concerted activities," themselves independently unlawful. N.L.R.B. vs. Fansteel Metallurgical Corp., 306 U. S. 240; N.L.R.B. vs. Sands Mfg. Co., 306 U. S. 332, 344; Southern Steamship Company vs. N.L.R.B., 316 U. S. 31; Hazel-Atlas Glass Co. vs. N.L.R.B., 102 F. 2d. 109, 118 (C. C. A. 4). But so long as the "activity" is not unlawful, we can see no justification for making it the occasion for a discharge; a Union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its case or that of others whom it wishes to win to its side. Such activities may be highly prejudicial to its employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs and has pro tanto shorn him of his powers * * *

As the quotation indicates, however, the "concerted activities" deemed worthy of statutory protection are not without qualification. Very early in

the administration of the original statute, it was established that the rights therein guaranteed did not include the right to engage in concerted activities "independently" unlawful. Among the activities thus held "unprotected" were those which contravened specific statutory provisions or basic statutory policies. N.L.R.B. vs. Sands Mfg. Co., 306 U. S. 332; Scullin Steel Co., 65 N.L.R.B. 1294; Joseph Dyson and Sons, Inc., 72 N.L.R.B. 445; Thompson Products, Inc., 72 N.L.R.B. 886. Other activities denied protection were those which involved a violation of other federal legislation or necessary state police regulations. N.L.R.B. vs. Fansteel Metallurgical Corp., 306 U. S. 240, Southern Steamship Company, vs. N.L.R.B. 316 U. S. 31; American News Company, 55 N.L.R.B. 1302. And the Board, itself, quickly developed a test of its own, independently of any considerations as to the "lawful" character of a given concerted activity, to determine whether particular types of conduct ought to receive statutory protection. In Harnischfeger Corporation, 9 N.L.R.B. 676, 686, the Board was called upon to consider the rights of employees who had engaged in a partial strike, and defined the issue as follows:

The instructions given the men were designed to carry out a program of the Amalgamated; this being so, there is no question but that the action bringing about the discharges was union activity. Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual

aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of collective activity. The question before us is, we think, whether this particular activity was so indefensible, under the circumstances, as to warrant the respondent, under the Act, in discharging the stewards for this type of union activity.

Within this frame of reference, employee disobedience and partial work stoppages have been denied statutory protection as breaches of an implied condition of the employment contract. N.L.R.B. vs. Montgomery Ward & Co., 157 F. 2d. 486, 496 (C. A. 8); See C. G. Conn, Ltd., vs. N.L.R.B., 108 F. 2d. 390 (C. A. 7); Elk Lumber Co., 91 N.L.R.B. 333. In the last case cited, the Board declared that:

Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act.

Wildcat strikes, undertaken in an effort to interfere with the collective bargaining process as applied by a duly authorized and designated bargaining representative, have also been denied statutory protection. Harnischfeger Corporation vs. N.L.R.B., 33 LRRM 2029, 2032 (C. A. 7) and the cases therein cited. And recently, a slowdown during contractual negotiations has been held unprotected because of its tendency to undermine the statute's general policy of balanced bargaining. Phelps Dodge Cop-

per Products Corporation, 101 N.L.R.B. No. 103, 31 LRRM 1072, 1074. cf. Underwood Machinery Company, 74 N.L.R.B. 641, 646-647. In addition, at least one court has held, expressly, that an employer ought not to be forced to finance "disloyalty" on the part of employees who issue publicity statements unfavorable to the enterprise, reasonably calculated to injure or destroy their employer's business, while continuing to collect their wages. Hoover Co. vs. N.L.R.B., 191 F. 2d. 308, 389-390 (C. A. 6).

In connection with the 1947 amendment of the Act, Congress, too, made its position clear with respect to the limitations which ought to be imposed upon "protected" concerted activity. In the House Conference Report (No. 510, 80th Congress, pp. 38-39) on the statute as amended, reference is made to certain early Board decisions that the language of the original Act protected concerted activities regardless of their nature or objectives. The conference report pointed out that these Board decisions had not received judicial approval—and went on to say that:

* * * the courts have firmly established the rule that under the existing provision of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts * * *

By reason of the foregoing, it was believed that the specific provisions in the House Bill excepting

unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusions of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. (Emphasis supplied)

In a comparatively recent case—Jefferson Standard Broadcasting Company, 94 N.L.R.B. 1507—the Board had occasion to consider the propriety of certain discharges effectuated because the employees in question had, while still in the respondent's employ, distributed a handbill which "deliberately" sought to alienate their employer's customers by impugning the technical quality of his

product—without any reference to the fact of its publication in connection with a labor dispute. The Board found that such tactics, under all the circumstances, were hardly less "indefensible" than acts of physical sabotage. It held that the employees involved had gone "beyond the pale" when they published and distributed the handbill in question.

On appeal, this decision was reversed and remanded. Local Union No. 1229, International Brotherhood of Electrical Workers, vs. N.L.R.B., 202 F. 2d. 186 (C. A. D. C., 1952). Essentially, the court held that the Board was empowered, under the statute, to find certain types of concerted activity unworthy of protection only on the basis of a preliminary finding that such activities were unlawful. In the absence of such a finding in the case at bar, the court remanded the case for a determination as to whether the particular conduct in issue was or was not lawful. And the court's views with respect to the scope of the agency's discretion, and the standard of judgment which the agency ought to apply, were set forth as follows:

Despite the broad language of Section 7, which assures employees the "right to * * * engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid and protection," certain activities are excluded from the Act's protective ambit. For example, the Act expressly prohibits jurisdictional strikes, secondary boycotts and strikes for recognition in defiance of a certified union. And the courts have denied protection to employees resorting to "unlawful" means,

e.g., a strike in contravention of the purpose of the Act, (citing cases) in violation of a federal statute forbidding mutiny, (citing case) or local laws prohibiting acts of violence or seizure of property, (citing case) or seeking "unlawful" objectives, e.g., concerted action to force an employer to violate a federal statute. (citing case) * * * Protection under Section 7 of the Act, then, is withdrawn only from those concerted activities which contravene either (a) specific provisions or basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute * * * The Board properly applied this rule to the extent that it found that the objective of the "second-class" hand bill "—to extract a concession from the employer with respect to the terms of their employment—was lawful." But the Board did not apply this rule to the handbill as a means for achieving that objective. Instead of determining the legality or illegality of the use of the handbill, it only found that, unlike other handbills used in the dispute which were signed by the Union and made reference to the pending negotiations, this one was "hardly less 'indefensible' than acts of physical sabotage" —apparently primarily because its purpose was undisclosed on its face * * * By giving "indefensible" a vague content different from "unlawful," the Board misconceived the scope of the established rule.

If the Court of Appeals for the District of Columbia has correctly defined the limits within which the Board is free to exercise its discretion with re-

spect to the protection of concerted activity, (cf. International Union UAWA, AFL, vs. Wisconsin Employment Relations Board, 336 U. S. 245) the issue posed in the present case would appear to be relatively simple: Would the organization of a Manpower Availability Conference, as projected, have involved "unlawful" conduct, within the meaning of that concept as defined in the Court's opinion? To this question, therefore, we are now required to turn.

(Since the above was written, the Supreme Court has decided that the Board's disposition of the case at hand fell within the area of its permissible discretion in the discharge of its responsibilities under Section 10 (c) of the Act, as amended. An inquiry as to the allegedly "unlawful" character of the MAC as a Union activity, however, would still seem to be germane. I so find.)

E. Did the Organization of the Conference Involve Unlawful Activity?

The Respondent, basically, advances only one contention in this connection. Essentially, its argues that SPEEA's plan to conduct an MAC involved a rejection of the "mutual obligation" fixed by the statute upon employers and employee representatives to "confer in good faith" with respect to wages, hours and other terms and conditions of employment, or the negotiation of a trade agreement. Under the circumstances, it is said, SPEEA's course of conduct involved a refusal to bargain collectively with the Respondent and amounted to an

unfair labor practice under Section 8 (b) (3) of the statute.

In theory, the argument may be sound. If the Union's attempt to plan and conduct a Manpower Availability Conference could be said to contravene a specific provision or basic policy of the statute, its "unlawful" character, under the established precedents, would seem to be established.

In the present state of the law, however, with respect to union refusals to bargain, I find myself unable to conclude that the contention has merit. Section 8 (b) (3) of the statute has been construed in a relatively small number of cases. Nearly all of them have been concerned with a union's insistence, as a condition precedent to the execution of an agreement or the conduct of general negotiations, that the employer agree to a provision made unlawful by the amended Act. National Maritime Union of America (The Texas Company, et al), 78 NLRB 971; Amalgamated Meat Cutters and Butcher Workers of North America, A.F.L. et al. (The Great Atlantic and Pacific Tea Company), 81 NLRB 1052; International Union, United Mineworkers of America, et al, (Jones and Laughlin Steel Corporation, et al), 83 NLRB 916; American Radio Association (Atlantic and Gulf Coasts), 82 NLRB 1344; International Typographical Union, et al. (Chicago Newspaper Publishers Association), 86 NLRB 1041; (Graphic Arts League of Baltimore), 87 NLRB 1215; (Printing Industry of America), 87 NLRB 1418; Essex County and Vicinity District Counsel of Carpenters, AFL (Fair-

mount Construction Company), 95 NLRB 969; Retail Clerks International Assoc., (Safeway Stores, Inc.), 100 NLRB 390; International Typographical Union, (American Newspaper Publishers Assoc.), 103 NLRB No. 57, 104 NLRB No. 117; Local 1664, I.L.A., (Puerto Rico Steamship Assoc.), 103 NLRB No. 112. In one case, a union was found guilty of a refusal to bargain because of its insistence upon an illegal demand outside of a contract. Conway's Express, 87 NLRB 972. Neither situation is involved in the instant case.

In the Chicago Newspaper Publishers Case, the Board declared that Section 8 (b) (3) of the statute imposes upon labor organizations a duty to bargain "coextensive" with the duty imposed upon employers under Section 8 (a) (5)—and it declared that the provisions of Section 8 (d), which establish the standard of "good faith" bargaining, restate, in statutory form, the principles established under Section 8 (5) of the original statute. And in Conway's Express, the Board declared that the union's good faith in advancing its challenged proposal could not be considered dispositive of the refusal to bargain issue. In its decision, the Board pointed out that it is the tendency of such proposals to "delay or impede or otherwise to circumscribe the bargaining process" which renders them improper. Does the instant case present a factual situation in which this dictum is applicable? I find myself unable to reach and maintain such a conclusion with conviction.

The Board has held, in cases involving respondent

employers, that threats on the part of such employers to close or dismantle their plants in order to avoid any need to recognize a union, to bargain with it, or to grant particular demands, involve a refusal to bargain. See e.g., Parma Water Lifter Co., 102 NLRB No. 37, 31 LRRM 1294; Howard-Cooper Corp., 99 NLRB 891; Arlington-Fairfax Broadcasting Co., 95 NLRB 846; Dixie Manufacturing Company, Inc., 79 NLRB 645, 658. These decisions are grounded in the theory that threats of the type indicated, when coupled with an apparent current ability to make them effective, indicate a rejection of the collective bargaining principle—i.e., the absence of any desire on the part of the employer to negotiate in good faith with respect to wages, hours and other conditions of employment.

It cannot be said, in my opinion, that an analogy between threats of this kind on the part of an employer, and a union's threat to initiate action calculated to "facilitate" a significant number of personnel resignations, would be completely unreasonable.

There are distinctions between the two "threats" now under consideration, however, which can and should be drawn. An employer's threat to close his plant is, in almost every instance, coupled with a very real and present ability to make such a threat effective. Its coercive character when addressed to employees or their chosen representatives, therefore, would be readily apparent. In the case of the Union, a plan to organize and conduct a Manpower Availability Conference would undoubtedly

pose a "threat" of potentially significant employee attrition—but such resignations as might occur would of course result from the decisions of individual employees, absent any inducement from the Union, to accept a better offer. In the MAC, as planned, the Union obviously would have had no control over the offers made, or the decision of any particular employee with respect to their acceptance or rejection. The element of coercion implicit in the situation, in short, would be grounded in the Respondent's fear, not of what the Union could or might do, but of the consequences which might be expected as a result of possible employee action, if the Union's program became effective. So considered, in my opinion, the analogy between the Union's course of conduct and an employer's threat to close a plant cannot be described as complete.

Would the Union's course of conduct in and of itself, however, "delay, impede, or otherwise circumscribe" the collective bargaining process? The question certainly could be answered affirmatively —since a Manpower Availability Conference, if successful, conceivably could lead to a significant diminution in the employee complement to be covered by any negotiated agreement. And a course of conduct calculated to facilitate the resignation of dissatisfied employees would certainly appear to involve a "partial" rejection of the collective bargaining principle—at least on the part of the resigned employees.

(The Respondent contends that a course of conduct directed to the stated end, for the

"possible benefit" of the employees who remained in the Respondent's employ, would not be consistent with the statutory duty of a "certified" representative to represent all of the employees in a bargaining unit in dealings with a particular employer.)

Upon the entire record, however, there can be no doubt that the Union also conceived of the MAC as something more than a device to "facilitate an exodus" of engineers from the Respondent's employ. It appears to have been anticipated—not unreasonably, in my opinion—that the MAC would furnish SPEEA with some data as to the "market value" of engineers and thus strengthen its hand in the negotiation of a trade agreement for the engineers who remained. Such anticipations—without regard to the argument which might be made as to the weight they were given by the Union's responsible officials—certainly envisioned a continuation of the negotiations and the eventual execution of an agreement.

I find the precise issue posed by the Respondent's contention, therefore, balanced with doubt. To date, the Board has, on a number of occasions, found unions guilty of a refusal to bargain when their demands related to an objective proscribed by the statute. It has had no occasion, as yet, to exercise its discretion in a case involving a lawful union objective pursued by allegedly improper means. In the absence of any guidance in the decisions, or the statute's legislative history, I am reluctant to express a conclusion on the issue. It involves, es-

sentially, a question of Board policy—with respect to which the Board, appropriately, should be the first to speak.

One question remains. Should the Union's course of conduct be considered unlawful on any other ground? The only theory suggested by the facts which would seem to be worthy of consideration is the possibility that the Union may have been guilty of conduct equivalent to a tortious inducement of breach of contract.

As defined in Lumley vs. Gye, 2 E. & B. 216 (Q.B. 1853) this tort involved the (1) malicious and (2) active inducement (3) of the breach (4) of a contract of personal service. As the decisions in the field proliferated, however—in this country and elsewhere—the requirement with respect to proof of malice was reduced to a requirement that mere wilfulness would suffice, and even this requirement was eventually abandoned. Today—in one jurisdiction or another—almost every contract, regardless of its nature, may be the object of the tort. Inducement of a breach, as an essential element of the wrong, has given way to prevention of performance; and the concept of active procurement has been expanded to include deliberate and even negligent interference with contractual relations.

As the law now stands, then, is the concept applicable here? In my opinion, this question must be answered in the negative.

> The United States Supreme Court, in Hitchman Coal and Coke C. vs. Mitchell, 245 U. S. 229 (1917), found a union guilty of wrongful

conduct because, in the course of a successful organizational drive, it induced employees, by virtue of their adherence to the organization, to breach a so-called "yellow dog" contract which was one of their conditions of employment. Insofar as "yellow dog" contracts are concerned, the case is no longer the law of the land—but it remains the most thorough and cogent statement by our highest court with respect to the application, in the labor relations field, of the concept that the inducement of a contract breach is wrongful. I have considered the rationale of the Hitchman decision in detail. It found a violation by the union of its legal duty to refrain from interference with a contractual relation, despite the fact that the workers involved had been employed "at will" and despite the fact that the employment relationship involved had been one terminable by either party at any time. Nevertheless, I have concluded that the case will not support a conclusion that SPEEA's conduct—as outlined in this report—was tortious, at law. It is clear that the organization and conduct of the MAC would not, in and of itself, have effected a severance of the employment relationship between the Respondent and its engineers—and there is no evidence whatever that the Union intended to offer any inducements, at the conference, to persuade its members to accept any offers made. A specific disclaimer of any such intention was given to the Respondent when

SPEEA notified Vice President Logan of its plans.)

A breach of contract is procured when the breach is directly and consciously sought, either as an end desired in and for itself, or as a measure out of which to gain some ultimate aim, such as a trade advantage. But a breach is merely caused when it occurs as an incidental—though, perhaps, clearly foreseen and inevitable—by-product of an effort to achieve some objective having no connection with the object which led to the making of the contract. If the distinction between procurement and mere causation is valid, and if it be conceded that it ought to lead to a difference in results, those results should be grounded in distinctions as to the motive which caused the "actor" involved in the case to embark upon the challenged course of conduct. I find no indication of a "wrongful" motive in this case. The true basis of the tort would seem to be the policy of the law to prevent the theft of promised advantages; if so, the necessary motive must be the conscious intention to appropriate for one's self—or one's organization—that which by law belongs to another. And such a motive may be said to exist, in my opinion, only when the object of the "actor" who induces a breach of contract is the same as the object of the injured party in the making of the contract. If the "actor's" mind is bent upon an entirely different object—even though his action incidentally may cause the breach—it can hardly be called a "wrongful taking" of another's property. See Sayre, "Inducing Breach of Con-

tract," 36 Harvard Law Review, 663, 677-680 (1923). Such is the case, in my opinion, here. I find no evidence in the present record that SPEEA intended, directly and consciously, to induce or encourage engineer resignations at a Manpower Availability Conference—either as a desirable end in itself, or as a means to achieve some direct advantage. Nor do I find evidence, in the record, of a conscious desire or intention on the part of the Union, to appropriate for itself that which by law belonged to others, i.e., the relational interest between the Respondent and its engineers. Its object in organizing the MAC cannot be equated, in short, with the objectives of the Respondent in the establishment of an employment relationship. In its search for current data as to the "market value" of engineers, and in its search for a device which would strengthen its position in current contractual negotiations, the Union planned only to create a situation in which then current employment relationships might be destroyed, as an incidental—though clearly foreseen—result. Upon the entire record, therefore, I have concluded that the course of conduct with which we are here concerned, apart from any ethical judgment which might be applied to it, did not involve anything tortious. It should not, then, be characterized as "unlawful" on that ground. I so find.

F. Did the Manpower Availability Conference Involve an Indefensible Activity?

As of the date on which this is written, the Board's appeal on the remand order issued by the

Court of Appeals for the District of Columbia in connection with the Jefferson Standard Broadcasting Company case, has been submitted to the United States Supreme Court on briefs and oral argument. In opposition to the position taken by the Court of Appeals, the Board currently seeks a determination by the Supreme Court that it is free to withhold the shield of statutory protection from activities which it may consider indefensible, even though they may not be independently unlawful. Until such time as the Supreme Court speaks on the issue, therefore, the statutory obligation imposed upon the examiner and the Board requires that consideration be given to the contention that the organization of the MAC involved an "indefensible" course of conduct.

(Since the above was written, on December 7, 1953, the Supreme Court has declared, in effect, in N.L.R.B. vs. Local Union No. 1229, I.B.E.W., that the Board was empowered, and even obligated, to find the activities involved in the case before it unworthy of protection, without regard to their "lawful" or "unlawful" character. Justice Burton, for the Court, referred to the statutory mandate laid down for the Board in Section 10 (c) of the Act, as amended —which forbids the agency to require the reinstatement of individuals as employees, or the payment of back pay, if such individuals have been suspended or discharged for cause. He found, in effect, that the respondent employer involved in the case had adequate "cause" for

the challenged discharges because the employees had engaged in "disloyal" conduct. In the opinion written for the Court, the conduct in question was characterized as "disloyal" because (1) It involved "a sharp, public, disparaging attack upon the quality of the company's product and its business policies" in a manner reasonably calculated to harm the company's reputation and reduce its income; (2) the attack had no direct relationship to any "labor controversy" then current, did not challenge any "labor practice" of the company, and did not solicit "public sympathy or support" for the employees responsible; and (3) the attack was deliberately "separated"—by those responsible for it—from the current labor controversy, made no reference to it, and "diverted attention" from it. Although the Court did not adopt the Board's characterization of the conduct in question as "indefensible" it did find that the Board had adequate reason to conclude that the employees had been discharged for "cause" within the meaning of the statute. However defined, therefore, the Board's obligation to exercise a wide discretion is clear.)

The disposition of the ultimate question however, has not been easy. Fundamental considerations of statutory policy, and the place of the agency in the American constitutional scheme, are involved. Does not the exercise of the wide discretion implied in the use of "indefensibility" as a standard of judgment imply that the Board may be called upon in

these cases, to exercise a "legislative" function in its decisional process? But if so, may not Congress have expressly so intended? See the House Conference Report, previously noted.

(The Supreme Court, in its decision with respect to the Jefferson Standard Broadcasting case, recently issued, has referred to the conference report, in this respect, as providing support for its interpretation of the statute's intent.)

Basic in my analysis of the issue now presented for consideration as to the alleged "indefensibility" of SPEEA's conduct, have been certain observations of Oliver Wendell Holmes. In an article on "Privilege, Malice, and Intent" in 8 Harvard Law Review 1, 3-9 (1894), he said:

* * * The intentional infliction of temporal damage * * * is actionable if done without just cause. When the defendant escapes, the court is of opinion that he has acted with just cause. There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage * * * But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions * * * or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction * * *

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case * * * Plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair * * * Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as lawmakers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree * * * the ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants * * * I make these suggestions * * * to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an articulate form as unconscious prejudice or half conscious inclination. To measure them justly

needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction * * * of organized society knowingly seeking to determine its own destinies. (Emphasis supplied)
* * * * *

How then, can a determination with respect to the alleged "indefensibility" of Pearson's MAC activity be articulated? Certain analogies, it seems to me, should first be noted.

At the outset, the right of every employee to seek more desirable employment, to solicit offers, and to resign if a more favorable offer is received, must be conceded. The Board has, however, held that the act of abandoning employment is unprotected activity, whether undertaken individually or in concert. Stibbs Transportation Lines, Inc., 98 NLRB 422; Carthage Fabrics Corporation, 101 NLRB No. 122; Crescent Wharf and Warehouse Company, 104 NLRB No. 106. In conformity with this principle, a voluntary, unconditional, notice of resignation to take effect in the future, as distinguished from a conditional "threat" to resign in the future if conditions are not met, is considered a complete act, since nothing more than the passage of time is contemplated by the parties. If no further action is to be anticipated or sought, as a condition precedent

to a voluntary termination, the activity cannot be regarded as one calculated to enforce employer capitulation for the purpose of mutual aid or protection. The Board has therefore held that when any activity involves a termination of the employment status, it is not entitled to statutory protection.

Such is not the case here, however. At best, the MAC, as projected, involved nothing more than a conditional indication that resignations might reaonably be expected to occur in the future if the Respondent failed to meet the Union's conditions —and the Board has held that a threat to quit or resign under such circumstances is a protected activity. Elwood C. Martin et al., d/b/a Nemec Combustion Engineers, 100 NLRB No. 162, enforced 33 LRRM 2046 (October 19, 1953, C. A. 9); Southern Pine Electric Cooperative, 104 NLRB No. 107.

(The Respondent has contended that the activities of SPEEA and Chairman Pearson of the MAC Committee, at the time of his discharge, amounted to overt acts that went far beyond any "threat" by employees to abandon their employment conditioned upon certain demands being met. Essentially, it is argued that it was SPEEA's declaration of its intention to hold an MAC if negotiations collapsed which involved a threat, but that the activation of the MAC and the issuance of the invitations for it constituted the first overt step in the anticipated "abandonment" of their employment by a number of the Respondent's engineers.

Without regard to my disposition, elsewhere in this report, of the Respondent's other contentions, I find this one to be without merit. The Respondent has attempted to equate a course of conduct, directed generally to the organization of the MAC, with its possible and foreseeable results in particular cases. The argument is not persuasive.)

If an individual "threat" to resign unless certain conditions are met is considered to involve protected concerted activity, as noted, and if the Union's effort to organize and activate the MAC is conceived to be nothing more than a conditional "threat" of future employee attrition, it could be considered entitled to statutory protection. The next question, then, would appear to be whether SPEEA's plan to conduct the MAC as a concerted activity, with the support and cooperation of a substantial part of the Union's membership, ought to make any difference.

Any determination that the concerted character of the activity makes a difference with respect to its right to protection would obviously involve a reversion, at least in some degree, to generally outmoded theories of civil and criminal conspiracy in the labor relations field. These concepts still have some vitality, however. As the Restatement of Torts put it:

Particularly in the case of labor combinations, the legal history has been that mere concert may make illegal or at least require justification for

conduct in which individuals are free to engage without the requirement of justification when acting independently. Thus, even after an individual worker could withhold his services or custom from any person for any reason, a combination of workers under the same circumstances still required justification. Partly this was due to the fact that individual conduct in this sphere was not a problem, whereas concerted action was. Partly it was due to the obvious differences in power between action by individuals and action by combinations of individuals. That such differences in power exist is still true with respect to conduct of individuals or groups of individuals acting in concert * * * Vol. 4 Restatement of Torts, 95-96 (1939) (Emphasis supplied)

To the extent that its character as a concerted activity rendered it capable of effective use as a vehicle of union power, therefore, the fact that the MAC involved concerted activity may well be a significant factor in any decision as to its propriety.

* * * * *

The General Counsel and the Union rely upon the contention that unions have traditionally sought to serve their members as employment agencies; it is argued that the MAC was nothing more than a technique which the Union planned to employ in order to perform this conventional union function.

Unions, however, normally seek to make available such employment opportunities as may come to their notice for currently unemployed members.

In organizing a conference designed to stimulate and channel offers of employment, on more favorable terms, to members already employed, SPEEA was attempting to do more than most union "hiring halls" have ever done; also, it was attempting, in effect, to encourage a course of conduct, on the part of employers, long condemned by the business community; specifically, SPEEA's letter of invitation solicited interested employers, in substance, to engage in "labor piracy" as that term is generally understood.

> (The fact that the Union's letter of invitation did not mention the Respondent or the fact that most of the Union's members were employed by it ought not to affect this conclusion, in my opinion. The Respondent's status as the only firm in Seattle which utilizes a substantial number of engineers is a matter of common knowledge. Even if it could be assumed, arguendo, that the existence of an impasse in the contractual negotiations between the Union and the Respondent was not widely known, most employers, in my opinion, would be able to infer that any sizeable corps of dissatisfied engineers in Seattle would consist, in the main, of those in the Respondent's employ. It is so found.)

The record, as previously noted, shows that only 18 employers out of approximately 2800 solicited, replied to the Union's MAC invitation. Although any inferences as to the reason for the MAC's failure to arouse employer interest, during a period in which engineers were certainly in short supply,

would clearly be speculative, it certainly could be inferred that many of the employers circularized withheld a response because of their unwillingness to appear, in public, as engaged in the recruitment of engineers among those already employed.

(The SPEEA committee responsible for the circulation of its "Area Representative News Letter" did in fact, express the opinion, after the event, that many of the invited firms might have concluded that attendance at the MAC would have involved a violation of business ethics.)

The General Counsel also contends that the MAC ought to be regarded as a protected concerted activity because it was specifically calculated to overcome a barrier to "freedom of contract" on the part of engineers, effectively imposed under a so-called "Gentlemen's Agreement" among the member firms of the Aircraft Industries Association, to which the Respondent belongs.

(The Aircraft Industries Association, as the record shows, is a trade association of approximately 80 firms engaged in the manufacture of aircraft, aircraft motors, and aircraft accessories. About 3½ years ago, in the face of a "tight" labor market for engineers, and developing competition in the recruitment of engineering personnel at all levels of skill, the membership of the association appears to have adopted a resolution expressive, inter alia, of a "concensus of opinion and belief" that firms in need of engineers ought to refrain from the

solicitation or acceptance of employment applications from engineers already employed in the industry, absent knowledge and acquiescence by the particular engineer's current employer. The record indicates that most, if not all, of the association members follow such a policy, although the specific procedures employed by them to give it effect may vary.)

The record does not reveal the identity of the employers solicited to attend the MAC, but there can be no doubt that member firms of the Aircraft Industries Association would be among the most likely recipients of the Union's letter of invitation. As to them, the letter would involve an obvious request or suggestion that the "Gentlemen's Agreement" with respect to "labor piracy" in the recruitment of engineers be abandoned. Other employers solicited, of course—not parties to the resolution—would have no such problem, and would merely have to consider whether attendance at the MAC could be squared with their sense of business ethics.

There can be no doubt that the "Gentlemen's Agreement" does impair the freedom of engineers to seek employment elsewhere in the field of aircraft manufacture—at least to some extent—since an engineer who desires to open negotiations with an employer other than his own conceivably may anticipate, reasonably enough, that his relationship with his superiors in current employment could be impaired as a result of their awareness of his attempt to secure work elsewhere, if that attempt proved unsuccessful. Such a hazard would probably

exist, however, even in the absence of a "Gentlemen's Agreement" so-called. And there is no indication in the record that the implementation of the AIA resolution by the Association's membership really "froze" engineers in their jobs; attempts by individual engineers to solicit better "offers" from new employers in the industry were still possible.

Insofar as the Respondent is concerned, its responsible officials testified—in substance—that the firm, if requested to permit negotiations between an AIA member and one of its engineers, would first attempt to determine the source of the employee's dissatisfaction, and to eliminate it if possible, in the hope that the employee would then be impelled to break off the negotiations; that employees who remained dissatisfied were always given permission to negotiate secretly for alternative employment elsewhere; and that such employees were not "terminated" merely because of their open demonstration of a desire to seek another position.

While it would seem to be clear that the MAC, as projected, would have operated as a counter-measure to the "Gentlemen's Agreement", and that it would have functioned—at least insofar as the AIA members were concerned—in direct opposition to the Association's expressed policy, it is difficult to see how the character of the conference as a counter-measure could be said to endow it with privilege or justification, in the context of the present case. The policies of the Association, as expressed in the resolution noted, and as implemented by its membership, do not appear to have been so

undesirable or rigid as to call for direct opposition in order to preserve employee rights.

> (The record shows that SPEEA had requested an explanation of the "Gentlemen's Agreement during the negotiations, and that the Respondent, in a letter dated on October 13, 1952, had set forth its understanding of the so-called "agreement", and its policies and procedure in giving effect to the "agreement's" terms. The SPEEA negotiators appear to have objected to the Respondent's policy of adherence to the "agreement" on the specific ground, already noted, that it restricted the freedom of individual engineers to seek employment elsewhere. But the Respondent, apparently, refused to alter its policy of adherence to the "agreement" and refused to accept any contractual modification which conceivably could be construed as acquiescence in the organization of MAC activities as a counter-measure.)

If the firm's observance of the "Gentlemen's Agreement" had involved complete restriction of the freedom of engineers to seek employment elsewhere in the industry—in a manner somewhat analogous to unilateral insistence upon the "reserve clause" used in professional sports—self-help measures designed to overcome the restriction, like the Manpower Availability Conference, might well be considered privileged or justified—because of the social interest in a free and mobile labor supply, under most circumstances. In the absence of proof that the "agreement" operated in such a fashion, however, its

existence and implementation—however irksome—would not seem to be sufficient, in my opinion, to provide legal justification for conduct otherwise subject to question. It is so found.

(In N.L.R.B. vs. Metal Mouldings Corporation, 12 LRRM 723 [C. A. 6] the court refused to enforce the reinstatement with back pay of an active union supporter who had, inter alia, advised his fellow metal polishers, if dissatisfied, to seek employment with a competitive firm at which his father was a foreman. The court's decision does not indicate clearly, however, whether it bottomed its refusal of an enforcement order on a belief that the employee's conduct in recruiting workers for a competitor justified his discharge, or whether it merely felt that his known and admitted activities in that respect vitiated the probative character of the other evidence relied upon by the Board to establish that he had been discharged for his union organizational activities. Additionally, it may be noted that the employee's action, apparently, had not been authorized or ratified by the union involved. It had no "official" character, and did not appear to involve "concerted activity" for the purpose of mutual aid or protection. I have not, therefore, relied upon the case in the evaluation of any contentions made in the instant matter.)

The General Counsel next contends that the impasse in negotiations between the Respondent and

the Union justified the Manpower Availability Conference.

> Chairman Gardiner testified—credibly, in my opinion—that the MAC would not have been activated if a contract with the Respondent had been in existence or immediately in prospect. Although couched in terms of opinion, this testimony seems to reflect, in sum, a consensus reached by the Union's responsible leaders. And there can be no doubt, as Gardiner also pointed out, that nothing was, in fact, done to activate the MAC until the SPEEA membership had clearly demonstrated the existence of a genuine impasse, by its rejection of the Respondent's "last" offer. Certainly, the MAC appears to have been activated in response to an impasse; whether the impasse in question justified such a response is, however, the issue.)

The strike, as a device to break an impasse in contractual negotiations, has, of course, received legislature sanction. See Section 13 of the Act, as amended. Essentially, the General Counsel seeks to equate the MAC with a strike and argues that, in this case, it should receive administrative sanction as well.

In considering this contention it should be noted at the outset that strikes, conventionally, are conceived of as temporary in character. As an economic weapon, and in legal contemplation, they look toward the preservation of a continuing—through interrupted—relationship. But the MAC, as the Union

conceived it, would have facilitated permanent terminations of employment, on the part of those employees able to utilize conference facilities to negotiate for more lucrative or more suitable employment.

(In cross examination, it may be noted—when pressed to explain why the Union considered the MAC an effective pressure tactic—Chairman Gardiner testified that SPEEA members considered termination data, i.e., data as to the rate of engineer turnover, to be "most pertinent" in the contractual negotiations, as an indication that the Respondent's wage scales and policies could stand revision. He indicated that such termination data, in itself, served as a "measure" of the opportunities existing for engineers elsewhere, and also as a measure of the "intolerableness" of current conditions in the Respondent's employ. Although he went on to deny that the MAC had been designed "primarily" to accelerate turnover, he admitted it had been recognized that an increase in turnover might develop as a "secondary aspect" of the conference, unless the engineers in attendance found that conditions at Boeing were in fact better than those available elsewhere. [Gardiner did testify, it is true, that SPEEA expected to use any information secured at the conference, as to the "going rates" for engineers at various levels of skill and experience, in its negotiations with the Respondent—but his testimony was coupled with a reference to

the pressure implicit in the restoration of "bargaining rights" to engineers, through the conference medium.] Upon the entire record, and particularly in view of the known fact that engineers were in "short" supply, it would seem to be clear that the Union did expect to see the Respondent's rate of engineer turnover accelerated as a result of the conference, and that it did expect to utilize such a development, if it occurred, as a bargaining lever in the negotiations which had reached a standstill. I so find.)

In the usual situation, the impact of a strike upon an employer's operations is both immediate and total—or, at the very least, significant. Employee attrition as the result of a Manpower Availability Conference might not have had the drastic effects characteristic of a strike situation at the outset—but there can be no doubt of the possibility that it might have reached such proportions as substantially to affect the Respondent's operations. And there can be no doubt, either, that its harmful results would have persisted far beyond those properly to be anticipated from a strike of reasonable duration. If successful, in short, the MAC could have contributed substantially to a significant impairment of the Respondent's ability to operate—which, in the case of engineers, could have lasted, conceivably, for a notably lengthy period of time.

(There is testimony in the record—which has not been disputed—as to the informed opinion

of the Respondent's officials that the successful completion of the MAC could have forced the Respondent to shut down several of its current projects; that its contracts with the Air Force might have been cancelled as a result, with immensely significant financial repercussions; and that the replacement of any experienced engineers who resigned, in the light of the current engineer shortage, would have taken as much as several years. The record shows that the fears of the Respondent in this respect were not articulated to impress the Board; they were communicated to the Union in connection with the Respondent's attempt to justify its course of conduct with respect to Pearson's termination. I so find. And the record, insofar as I can determine, contains no evidence whatever to warrant an inference that the Respondent's fears were illogical or ill-founded.)

There can be no doubt that the MAC, if conducted according to plan, could have been a source of potential damage to the Respondent—and that it conceivably could have been far more significant in its effect upon the economic health of the Respondent's enterprise than any benefit which the Union might have derived from its employment, as a pressure tactic, to break the current bargaining impasse. Such being the case, there would certainly seem to be serious reason to doubt "the merit of the particular benefit to themselves" intended by the Union membership—and, of course, serious reason to doubt, therefore, whether the impasse in the nego-

tiations could be said to "justify" the MAC as a device to stimulate renewed negotiations.

So much for the contentions of the General Counsel and the observations suggested by them. One argument advanced on behalf of the Respondent, however, remains to be noted.

The Respondent contends that the MAC, if convened at the call of engineers in its employ, would properly have been subject to characterization as an act of employee disloyalty. It is argued, specifically, that SPEEA—by the publicity it gave the MAC among the employees in the unit it represented—intended to popularize and induce participation in the conference, and that its conduct in this respect actually tended to induce and encourage the Respondent's engineers to abandon their employment as a result of such participation.

> (Chairman Gardiner did testify, it is true, that the MAC was not activated to "lure" engineers away from the Respondent's employ—but, as we have seen, an acceleration of engineer turnover within the SPEEA unit was certainly anticipated as a possible "secondary" result of the conference in question, and it is admitted that the Union intended to utilize any acceleration in turnover which might develop as an additional "lever" in the current negotiations.)

I have found the argument that SPEEA intended to induce its members to abandon their employment lacking in merit. But from the Respondent's point of view, it would seem to make little differ-

ence whether any acceleration of employee turnover was deliberately induced or whether it was merely foreseen as a possible or probable result of the Union's proposed course of action. Its counsel has argued, at length, the unfairness of any determination which would, in effect, require an employer to finance "disloyal" conduct on the part of his employees, by allowing them to engage, free of any threat of discharge or other hindrance, in a type of activity which could, conceivably, subject him to "irreparable" injury. In the light of the informed opinion expressed by the responsible officials of the Respondent—which has not been disputed—the firm would seem to have had ample reason to fear that employee attrition as a direct result of the conference could have continued to affect its operations adversely long after the termination of any current contractual negotiations with the Union here involved.

(In this connection, the Respondent also sought to elicit, for the record, testimony with respect to other "pressure tactics" suggested by the Action Committee and considered by the Union membership. Among the tactics suggested were: refusals to punch time clocks on the part of non-exempt employees; refusals to work overtime; the arrangement of simultaneous medical or dental appointments by all of the employees within the SPEEA unit; intermittent work stoppages; union meetings during working hours; and action calculated to "neutralize" the Respondent's recruitment campaign in vari-

ous colleges and universities. None of these proposals appear to have been approved by the Executive Committee, however, and none appear to have been adopted; under the circumstances I do not believe that any weight need be given, in this case, to the fact that they may have been suggested to the Union's membership at the same time as the Manpower Availability Conference. As suggestions, and nothing more, they certainly ought not to influence any judgment as to the essential character of the MAC; although I received the evidence with respect to these additional "pressure tactics" have disregarded it as immaterial with respect to any determination as to whether the MAC proposal, in and of itself, involved employee "disloyalty" by virtue of its declared purposes and anticipated effect.)

Under the circumstances, the contention that a "successful" conference necessarily involved conduct on the part of the conference managers properly subject to characterization as "disloyal" certainly cannot be dismissed out of hand.

G. Conclusions With Respect to Pearson's Discharge.

After lengthy consideration, and with due regard for the dictum of the late Justice Holmes that policy judgments in this field ought to be consciously articulated, I find myself constrained to find merit in the Respondent's contentions.

Whatever the Court of Appeals may have said in its review of the Jefferson Standard Broadcast-

ing Company case with respect to the Board's discretion, and its limits, there can be no doubt that the Congress expects the Board to continue its current policy, and to withhold any statutory sanctions for the protection of "undesirable" or "improper" concerted activity. And administrative deference to such a legislative policy would certainly seem to require the most thorough consideration of a contention that some particular type of employee conduct ought to be proscribed as indefensible.

(The Supreme Court's decision—just issued—in the Jefferson Standard Broadcasting Company case confirms the correctness of this view. After pointing out that the Board had considered the course of conduct involved in that case as "separate" and apart from any other concerted activity undertaken in connection with the "labor controversy" in which the employees were engaged, the Court went on to say that: "Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in Section 7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act." [Emphasis supplied] Although the Court did not see fit to explicate its rationale in support of the proposition stated, it has cited many of the cases already noted in this report in support of its

conclusion. I can only infer that the Court has recognized the propriety of the concept that a given course of conduct may be denied protection under the Act if justifiably subject to characterization as "indefensible" in the light of the statutory objectives.)

Weighed in the balance, the Manpower Availability Conference, in my opinion, ought to be so characterized. In terms of the standard suggested by the late Justice Holmes, the worth of the result which the Union sought—bargaining leverage in the negotiation of a new trade agreement—cannot stand comparison with the potentially heavy damage which the Respondent could have suffered if such a conference had elicited a substantial response.

(Vice President Logan testified without contradiction, and I find, that the Respondent's backlog of business at its Seattle Division currently stands at almost an even billion dollars. It involves orders, primarily placed by the United States Air Force, for items vital to our national defense: heavy bombers, guided missiles, gas turbines, and various classified research and experimental projects. All of the Respondent's projects appear to be technical —some highly so—and impossible of completion in the absence of an adequate engineering staff. Logan estimated that if a substantial number [500] of the firm's engineers had resigned at the same time, or within a short period, the Respondent would have had to suspend one project after another as long as the exodus

continued; he expressed the opinion—without contradiction—that the firm would have lost "millions of dollars" worth of business through the forced abandonment of current projects or their cancellation by the Air Force, and that it might have taken the Respondent several years to recover from such a blow, at a cost to it of unnumbered millions of dollars. The Vice President's estimates and opinion have not been challenged as unreasonable.)

It cannot be said as a matter of law, in my opinion, that the Respondent was under an obligation to assume such a substantial risk. When confronted with the possibilities indicated, it was entitled to take appropriate defensive action. In the light of all the considerations herein expressed, therefore, and upon the entire record, I find that the Union's plan to call a Manpower Availability Conference did not involve a protected concerted activity, and that the discharge of Charles Robert Pearson for his activities in connection with the formulation and implementation of the plans for such a conference, was privileged.

H. The Negotiations With Respect to Pearson's Discharge.

If the Respondent was privileged to discharge Pearson, as I have found, it would seem to follow that his termination, in and of itself, cannot be said to constitute a "refusal to bargain" with the Union —and that it ought not to be considered evidence of "bad faith" on the part of the Respondent,

either, in connection with the contractual negotiations then current.

The General Counsel contends, however, that the Respondent failed to fulfill its statutory obligation to bargain with the Union when it denied Union representation to Pearson at the conference which preceded his discharge. Vice President Logan, in his testimony, apparently intended to suggest that his actions, during the conference in question, were dictated by a belief that it had been called to determine the facts with respect to Pearson's status as a licensed and bonded employment agent—and that no grievance or bargainable matter was involved. That position, in my opinion, cannot be characterized as sound or well taken. As the record reveals, Logan was fully prepared to suggest, in the event of an acknowledgment by Pearson with respect to his "employment agency" activities, that such activities would be considered incompatible with continued service on his part as an employee of the Respondent, and to order his discharge in the event of a refusal on his part to give up the activities in question. He was also aware, I find, of the fact that Pearson's activities were being conducted under Union sponsorship and that they involved an official Union project. Under the circumstances, Pearson may well have been within his rights, under the statute, when he sought to insist that the conference be suspended until certain designated SPEEA representatives arrived. Cf. N.L.R.B. vs. Ross Gear and Tool Co., 19 LRRM 2190, 2194-2195 (C. A. 7).

(The respondent, however, has pointed out in its brief—with considerable logical force—that Pearson apparently anticipated the subject-matter to be covered in his talk with Logan, and that the record reveals no reason why he could not have arranged for the presence of a SPEEA executive, if he had so desired.)

The question, however, clearly became moot thereafter. When the Union officials learned of the situation and requested a conference at which the organization's position could be stated, their request was readily granted; the conference was held, and the Respondent's opinion with respect to the propriety of Pearson's conduct was discussed in detail. Two additional conferences were held with a Union-designated subcommittee.

(The SPEEA representatives contended, throughout, that Pearson had been improperly discharged because his service as the MAC Committee chairman involved protected concerted activities. And the Respondent maintained the opposite view. As its counsel declare in their brief: "The situation was one in which the area of negotiation available to the parties was bounded by a proposal for the reinstatement of Mr. Pearson and a refusal to do so. SPEEA proposed it, the Respondent refused to accede, with an explanation of its position, and it is clear that an impasse was reached concerning firmly opposed viewpoints." The Act, as the Respondent asserts, does not require further

negotiation after it is apparent that a settlement of the matter in issue is impossible.)

Whether the matter, in the final analysis, was treated as a grievance or as a matter for negotiation, the Respondent appears to have fulfilled, completely, its obligation to bargain with the designated representative of its employees in regard to Pearson's discharge. I so find.

I. The Salary Increase.

Essentially, it would seem to be the General Counsel's contention with respect to the March 12, 1953, compensation adjustments that a salary increase, otherwise unobjectionable, which coincides with a course of conduct indicative of "bad faith" and a rejection of the collective bargaining principle, should itself be construed as an act of "bad faith" and, per se, as a refusal to bargain. Since the basic premise of this contention—the argument that Pearson's discharge revealed the Respondent's disinclination to recognize SPEEA'S right to press for a favorable bargain, and thus injected "bad faith" into a situation previously untainted—has been rejected, the stated contention with respect to the impropriety of the March, 1953, compensation adjustments would appear to have no merit.

(Counsel for the Respondent have also pointed out—correctly, in my opinion—that Pearson's discharge and the related conferences between the parties were never directly related to the contractual negotiations, except in connection with SPEEA's declared intention to insist upon the dischargee's reinstatement as a condition

> precedent to any further favorable consideration of the Respondent's contract offers. The impasse in the negotiations had developed before Pearson's discharge. And the Union's letter of February 6, 1953, which rejected the Respondent's proposal to effectuate the salary increases and stated its reasons for the rejection, made no mention of the Pearson incident—then a subject of concurrent discussion. Thus, even if the General Counsel's contentions with respect to the discharge could be said to have merit, it would certainly be arguable, at least, that the discharge could not—and did not—affect the character of the impasse and thereby color the Respondent's decision to adjust salary rates and rate ranges unilaterally.)

Absent all considerations involved in the allegedly discriminatory discharge, then, the record reveals nothing more than pay increases unilaterally effectuated by an employer after their presentation to the designated representative of the employees in collective bargaining negotiations. The proposed increases had been officially rejected—or, at the very least, characterized as unacceptable. As Justice Burton said in the Crompton-Highland Mills case, at 337 U. S. 217:

> Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations. (Citing cases.)

The record in the instant case reveals a consistent effort on the part of the Respondent to secure the approval or acquiescence of SPEEA with respect to the compensation adjustments it had proposed, precisely on such grounds. But the Union refused, throughout, to indicate its approval or acquiescence with respect to the adjustments involved. I find nothing in the record to suggest that the Respondent's action was intended to "undercut" the Union or to disparage it as the exclusive representative of any employees. Indeed, the record would seem to me entirely clear—to the contrary—that the Respondent made the disputed adjustments effective only in order to assure some degree of success for its spring campaign to recruit personnel among the graduates of the nation's colleges and technical schools.

> (The testimony offered on behalf of the Respondent indicates—without contradiction—that qualified engineers were then in short supply, and that the firm's Engineering Division was inadequately staffed. Logan described the situation in the fall of 1952 as "especially critical"; I credit his estimate. The efforts of the Respondent, in the fall of 1952, to recruit new employees [as detailed at length by Vice President Logan] appear to have met with decreasing success—and the firm's Industrial Relations Department appears to have been urged, repeatedly, by the Engineering Division, to take all possible steps to improve the situation by an increase in salary rates. Later, in the fall

and winter of 1952-53, several competitive California aircraft firms appear to have instituted salary increases approximately equivalent to those offered by the Respondent; these developments, the record shows, were expected to have an adverse effect upon the Respondent's competitive position in the labor market, with respect to salary rates for newly hired engineers, unless corrected. I so find.)

And the notice which accompanied the first checks to reflect the increases indicated clearly that they had been made effective in the absence of a contract and "without prejudice" to the current negotiations between the parties. All of the employees were plainly told that the increases involved did not equal those requested by SPEEA, that SPEEA had been advised and consulted before the Respondent acted, and that the organization had presented its objections. The notice, in my opinion, was reasonably calculated to preserve the Union's prestige as a bargaining agent; I find it entirely unobjectionable. And, under all the circumstances, I find that the Respondent's action of March 12, 1953, with respect to the unilateral allowance of a salary increase and certain adjustments in connection with the calculation of overtime pay, did not involve an unfair labor practice. N.L.R.B. vs. Norfolk Shipbuilding and Drydock Corp., 195 F. 2d. 632 (C.A. 4); N.L.R.B. vs. Bradley Washfountain Company, 192 F. 2d. 144 (C.A. 7); W. W. Cross and Co., 77 NLRB 1162, enforced 174 F. 2d. 875 (C.A. 1).

Conclusions of Law

Upon the foregoing findings of fact and upon the entire record in the case I make the following conclusions of law:

1. The respondent is an employer within the meaning of Section 2 (2) of the Act, engaged in commerce and business activities which affect commerce, within the meaning of Section 2 (6) and (7) of the Act, as amended.

2. Seattle Professional Engineering Employees Association is a labor organization within the meaning of Section 2 (5) of the Act, as amended.

3. The Respondent, Boeing Airplane Company, has not engaged in unfair labor practices as alleged in the complaint, within the meaning of Section 8 (a) (1), (3) and (5) of the Act, as amended.

Recommendation

Upon these findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the complaint against the Respondent, Boeing Airplane Company, be dismissed in its entirety.

Dated this 28th day of December 1953.

/s/ MAURICE M. MILLER,
Trial Examiner.

APPENDIX

Seattle Professional Engineering Employees Association

321 Arcade Building Seattle 1, Washington

Are You in Need of Additional Engineers?

The Seattle Professional Engineering Employees Association, with a membership of 2300, invites your Company to participate in a Manpower Availability Conference to be held in Seattle about March 9th, 1953. The purpose of the Conference is to put employers of engineers in contact with those of our members who are available for new positions.

Over 500 engineers, scientists and industrial mathematicians are pledged to attend the Conference. Represented in this group are men of assorted lengths of experience and types of training as is portrayed by the attached graphs. A distinction between men who are actively seeking new connections and those whose interest is more dependent upon the advantages of other situations will be noted in the make-up of the graphs.

These engineers are looking for more than a change of scenery. They are employed engineers who feel they would be capable of greater accomplishment in positions where engineering talents are directed more specifically to engineering work and where credit for individual effort and recognition of engineering excellence are more general. They seek a working climate where their training and ability will be more fully utilized and in which com-

pensation is in proportion to talent and productiveness.

In order to provide a better understanding of the type of conference which is contemplated, a general outline of its operation might be of interest. It is planned that the Conference will be conducted in two separate phases.

The first phase will provide the means of quickly and efficiently arranging interviews between the five hundred engineers and the participating companies. This will be accomplished by conducting exposition-like meetings on as many consecutive evenings as appears necessary. At this time, the engineers, perhaps accompanied by their wives, will visit the various booths which are to be provided for each of the participating companies.

The representatives of each company will here have the opportunity to address groups of engineers, to explain the company's needs and the advantages of employment with it, and to distribute descriptive literature and application blanks to those who are interested. Secretaries at a centrally located Association booth will then make appointments for private interviews.

Providing an opportunity for the participating companies to show a limited number of motion pictures is under consideration. The Association will provide ditto and mimeograph facilities for any duplicating the company representatives may require. An augmented Association secretarial staff will also be at their disposal.

The second phase of the Conference will consist

[Title of Board and Cause.]

REQUEST ON BEHALF OF RESPONDENT FOR PERMISSION TO ARGUE ORALLY BEFORE THE BOARD

In accordance with Section 102.46(c) of the Rules and Regulations of the Board, Series 6, Respondent respectfully requests permission to argue orally, before the Board, in support of the recommendation of the Trial Examiner as set forth in the Intermediate Report and Recommended Order, dated December 28, 1953, in this case.

Dated this 16th day of January, 1954.

BOEING AIRPLANE COMPANY,
Seattle Division, Respondent
/s/ By DeFOREST PERKINS,
Its Attorney

[Title of Board and Cause.]

GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS

The General Counsel excepts to the Trial Examiner's findings and his failure to make findings in his Intermediate Report and Recommended Order as follows:

Page 25, line 23: Failure to make specific finding that the alleged violation of Section 8(b)(3) by the Union was not an illegal act nor violative of the Act.

Page 31, line 32: Finding that there is no indication in the record that the implementation of the AIA resolution by the Association's membership really "froze" engineers in their jobs.

Page 31, line 54: Finding that the character of the conference as a counter measure to the gentlemen's agreement does not endow it with privilege or justification.

Page 31, line 54: Failure to find that the character of the conference as a counter measure to the gentlemen's agreement does endow it with privilege and justification.

Page 32, line 24: Finding that the gentlemen's agreement in its existence and implementation would not seem to be sufficient to provide legal justification for the conduct of the MAC.

Page 33, line 35: Finding that it would seem to be clear that the Union did expect to see Respondent's rate of engineer turnover accelerated as a result of the conference, and that it would expect to utilize such development if it occurred as a bargaining lever in the negotiations.

Page 33, line 35: Failure to find that the expected acceleration in Respondent's rate of engineer turnover as a result of the conference was entirely contingent upon the possibility that Boeing would be found as a result of the conference not to be competitive in wages and working conditions.

Page 33, line 47: Conclusion that harmful results possibly resulting from the MAC would have persisted far beyond those properly to be anticipated from a strike of reasonable duration.

Page 33, line 47: Failure to find that harmful results possibly resulting from the MAC would not have persisted beyond those properly to be anticipated from a strike of reasonable duration.

Page 33, line 50: The conclusion that MAC, if successful, could have contributed substantially to significant impairment of the Respondent's ability to operate, which could have lasted for a notably lengthy period of time.

Page 34, lines 9-19: Finding that there can be no doubt that the MAC, if conducted according to plan, could have been a source of potential damage to Respondent.

Page 34, lines 9-19: Failure to find that the particular benefit to themselves intended by the Union membership was meritorious.

Page 34, lines 9-19: Finding of serious reason to doubt the merit of the particular benefit to themselves intended by the Union membership by the MAC.

Page 35, lines 35-42 and page 36, lines 1-7: Characterization of the MAC as in indefensible employee-type of conduct.

Page 36, lines 29-37: Conclusion that Respondent was not under an obligation to assume a substantial risk presented by the MAC.

Page 36, lines 9-28: Failure to find that the conjectures and estimates of Vice-President Logan, as to the possible effect of the MAC, were not evidence that such effects were the reasonably to be expected effects of activity such as the MAC as projected.

Page 36, lines 29-30: Implied finding that the

MAC was such a substantial risk that Respondent was under no obligation to assume it.

Page 36, lines 29-30: Failure to find that the MAC was not such a substantial risk that the Respondent was under an obligation to assume it.

Page 36, lines 34-37: Finding that the Union's plan to call a manpower availability conference did not involve a protected concerted activity, and that the discharge of Charles Robert Pearson for his activities in connection with the formulation and implementation of the plans for such a conference was privileged.

Page 36, lines 34-37: Failure to find that the Union's plan to call the manpower availability conference involved a protected concerted activity, and that the discharge of Charles Robert Pearson for his activities in connection with the formulation and implementation of the plans for such a conference was privileged.

Page 37, lines 36-39: Finding that Respondent fulfilled completely its obligation to bargain in regard to Pearson's discharge.

Page 37, lines 36-39: Failure to find that Respondent did not fulfill completely its obligation to bargain in regard to Pearson's discharge.

Page 37, lines 48-54: Finding that previously untainted impasse was not injected with bad faith and hence the compensation adjustments of March 1953 were not improper.

Page 37, lines 48-54: Failure to find that impasse was injected with bad faith and hence the com-

pensation adjustments of March 1953 were not proper.

Page 38, lines 6-11: Failure to find the discharge of Pearson, if not privileged, could and did affect the character of the bargaining impasse.

Page 38, lines 6-11: Conclusion that Respondent did not violate Section 8(a)(5) of the Act by unilaterally adjusting salary rates and rate changes.

Page 38, lines 6-11: Failure to conclude that Respondent violated Section 8(a)(5) of the Act by unilaterally adjusting salary rates and rate changes.

Page 38, line 59 to page 39, line 10: Finding that the notice which accompanied the first checks to reflect the unilateral salary increases was reasonably calculated to preserve the Union's prestige.

Page 38, line 59 to page 39, line 10: Failure to find that the notice which accompanied the first checks to reflect the unilateral salary increases were reasonably calculated to undercut the Union's bargaining position.

Page 39, lines 29-31: Finding as conclusion of law No. 3 that Respondent, Boeing Airplane Company, has not engaged in unfair labor practices as alleged in the Complaint within the meaning of Section 8(a)(1), (3) and (5) of the Act, as amended.

Page 39, lines 29-31: Failure to find as a conclusion of law that the Respondent, Boeing Airplane Company, has engaged in unfair labor practices as alleged in the Complaint within the meaning of Section 8(a)(1), (3) and (5) of the Act, as amended.

Page 39, line 35: Recommendation that the Complaint be dismissed in its entirety.

Page 39, line 35: Failure to recommend that the Respondent shall cease and desist from taking further action within the scope of Sections 8(a)(1), (3) and (5) and failure to order that Respondent shall take such affirmative action as would be consistent with a finding that Respondent by its acts and conduct has violated Section 8(a)(1), (3) and (5) of the Act.

[Title of Board and Cause.]

RESPONDENT'S STATEMENT OF EXCEPTIONS TO CERTAIN FINDINGS AND RULINGS OF THE TRIAL EXAMINER

It is the conclusion of the Trial Examiner as stated in the Intermediate Report and Recommended Order dated December 28, 1953, that the Respondent has not engaged in unfair labor practices as alleged in the complaint, and it is his recommendation that the complaint against the Respondent be dismissed in its entirety.

Respondent urges the adoption of such recommendation and has filed its brief in support of the Intermediate Report and Recommended Order.

The exceptions noted herein are for the purpose of permitting Respondent to continue to urge all matters in support of such recommendation that were presented to the Trial Examiner in support

of Respondent's position. Such exceptions are as follows:

1. Respondent excepts to the Trial Examiner's finding (IR 19, lines 13-17, 19-21, IR 33, lines 34-39) to the effect that the primary objective of the Manpower Availability Conference (herein designated as the MAC) was "to make possible a strong Union line in the current negotiations". Respondent does not except to any finding that the MAC at one time was intended to have such an objective, in the early stages of its development, but such finding of the Trial Examiner fails to recognize that the prime objective of the MAC, after it had passed from the stage of threat to the stage of overt actuality, was no longer to facilitate and improve the charging union's bargaining position, but rather actually to induce and cause employees represented by the charging union to leave Respondent's employ (See Gen. Couns. Ex 4 and attachment thereto).

2. Respondent excepts to the Trial Examiner's finding (IR 19, lines 35-37) that the vote of employees upon the issue of the MAC reflected "the desires of an interested, representative, cross section of the membership". Only those in the unit who were members of the charging union were afforded the opportunity to vote (Tr. 85, lines 4-7). Of 3,500 in the unit, 2,100 were polled on the subject, 872 responded, and 96 (or 10% of those responding, 4½% of those polled, and 3% of the unit) indicated a desire to change companies. 40% of those responding stated that they would not participate. Activation of the MAC was approved at a meeting

with no more than 182 in attendance (Tr. 97, lines 3-4), indicating a "majority" that actually amounted to less than 3% of those in the unit and less than 5% of the membership of the charging union (Tr. 44, line 10 to Tr. 45, line 18, Gen. Couns. Ex. 2).

3. Respondent excepts to the Trial Examiner's finding (IR 19, lines 19-20, 40-42, 51-54) that the MAC, as it developed, represented a "concerted activity" within the meaning of that term as used in the statute. It is Respondent's contention in this respect that "concerted activities", as that term is intended to be used in the statute, must be related to a collective action of employees against, or in respect of a particular employer. A great many concerted activities of employees, in the general sense of the term (e.g. organizing and participating in a community fire protection association, engaging in the social and business activities of a labor organization having no contact with or relationship to the individuals' immediate employer, etc.), are not the type of "concerted activities" to which the statutory protection is extended. In this respect it is Respondent's contention that the MAC was not a "concerted activity" in the statutory sense after it was activated and its prime objective became that of facilitating and inducing employees to leave Respondent's employ.

4. Respondent excepts to the failure of the Trial Examiner: to find (IR 23, lines 15-61, IR 24, lines 1-61, IR 25, lines 1-25) that the charging union's plan to conduct an MAC, as shown by the entire

record in this case, involved a rejection of the "mutual obligation" fixed by the statute upon employers and employee representatives to confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of a trade agreement; and to find that the charging union's course of conduct involved a refusal to bargain collectively with the Respondent and amounted to an unfair labor practice under Section 8(b)(3) of the statute.

5. Respondent excepts to the Trial Examiner's finding (IR 25, lines 33-61, IR 26, lines 1-54) that the course of conduct in connection with the MAC did not amount to tortious conduct. The prime objective of the MAC after the letter (Gen. Couns. Ex. 4) was mailed to various firms throughout the United States was to facilitate and induce engineers to break off employment and contractual relationship with Respondent. The objective of the letter is indicated clearly by the contents thereof.

6. Respondent excepts to the Trial Examiner's finding (IR 29, lines 6-8) that the MAC as projected, involved nothing more than a conditional indication that resignations might reasonably be expected to occur in the future if the Respondent failed to meet the charging union's conditions. In the period prior to the discharge, the union had used the MAC simply as a threat and as a pressure tactic in the negotiations and activation was postponed pending further negotiations (Tr. 100, line 1, to Tr. 101, line 2). With full knowledge of this threat, Respondent then advised the union that Re-

spondent was unwilling to grant its demands (Resp. Ex. 11). The MAC and the activities related thereto then became matters of actuality rather than threat. After the "threat" stage and until the cancellation of further plans, the union was engaged in a course of action that in essence amounted to a categorical rejection of employment with Respondent, rather than simply an effort to improve its bargaining position.

7. Respondent excepts to the Trial Examiner's finding (IR 31, lines 24-31) that "there can be no doubt that the 'gentlemen's agreement' does impair the freedom of engineers to seek employment elsewhere in the field of aircraft manufacture—at least to some extent—since an engineer who desires to open negotiations with an employer other than his own conceivably may anticipate, reasonably enough, that his relationship with his superiors in current employment could be impaired as a result of their awareness of his attempt to secure work elsewhere, if that attempt proved unsuccessful." The record discloses no such impairment of the freedom to seek employment elsewhere. It is to be noted, in this connection, that the Trial Examiner later finds (IR 31, lines 31-32) "such a hazard would probably exist, however, even in the absence of a 'gentlemen's agreement' so-called." If the "hazard" would exist in any event, the "gentlemen's agreement" can hardly be regarded as the cause. In this connection Respondent excepts to the ruling of the Trial Examiner in admitting evidence, contended by Respondent to be irrelevant and immaterial, as to the

so-called "gentlemen's agreement" (Tr. 141, line 17, Tr. 297, line 3). It was not mentioned in the complaint and it was not pertinent to any issue raised by the complaint.

8. Respondent excepts to the Trial Examiner's ruling (Tr. 146, line 22, to Tr. 147, line 9) overruling Respondent's objection to the admission of Exhibits 11 to 15, inclusive. Such exhibits were irrelevant, immaterial, were not the best evidence and constituted hearsay.

9. Respondent excepts to the Trial Examiner's finding (IR 34, lines 42-43) that the charging union did not intend to induce its members to abandon their employment. The union executives promoted the MAC (Tr. 36, line 20, to Tr. 37, line 1). The MAC was featured time after time in the union publications (Tr. 191, line 25, to Tr. 193, line 3; Tr. 260, lines 7-22). It was characterized as a "safe" substitute for a strike (Tr. 178, lines 9-25). Forms of pledges relating to it were circulated to the union membership (Tr. 49, lines 1-4, Gen. Couns. Ex. 2). Such publicity and such circularization of pledges could not but tend to popularize and induce participation, and eventually resignations from Respondent's employ. Approval and activation of any course of action by a labor organization is in itself an inducement to participation by substantial numbers of its members and others in the unit represented by it. Abandonment of employment was the essence of the idea back of the MAC after the Pearson letter (Gen. Couns. Ex. 4) was mailed to the various firms throughout the country.

10. Respondent excepts to the Trial Examiner's finding (IR 36, lines 56-57) that the conference between vice-president Logan and Pearson, terminating in the discharge of Pearson, involved a bargainable matter insofar as such conference concerned a determination of the facts with respect to Pearson's status as a licensed and bonded employment agent. We know of no authority compelling the conclusion that a discharge for cause (i.e. discharge of an employee for engaging in work or other outside activities that are inimical to the duties and responsibilities of his position with the discharging employer) is a bargainable matter, particularly where there is no dispute or difference of opinion as to the basic facts.

Dated this 16th day of January, 1954.

BOEING AIRPLANE COMPANY,
Seattle Division

/s/ By HOLMAN, MICKELWAIT, MARION,
BLACK & PERKINS,
/s/ DeFOREST PERKINS,
/s/ WILLIAM M. HOLMAN,
/s/ F. THEODORE THOMSEN,
Its Attorneys

[Letterhead of Houghton, Cluck, Coughlin & Henry]

February 4, 1954

National Labor Relations Board
Health, Education and Welfare Building South
Washington 25, D. C.

Re: Boeing Airplane Company and Seattle Professional Engineering Employees Association. Case No. 19-CA-806.

Gentlemen:

Enclosed are seven copies each of the Exceptions and Brief of the Seattle Professional Engineering Employees Association.

We respectfully request that the Board hear oral argument in this case, and that additional time be allowed for that purpose. We submit that, with the numerous points to be presented, a minimum of one hour should be allowed for presenting SPEEA's case.

We are sending a copy of this letter to counsel for the NLRB and counsel for Boeing.

Yours very truly,

HOUGHTON, CLUCK, COUGHLIN & HENRY,

/s/ By JACK R. CLUCK

JRC:mm—Enc.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS OF SPEEA

SPEEA joins with the General Counsel in the latter's "Statement of Exceptions" and makes the following exceptions:

1. The Trial Examiner should have found that during the course of the negotiations Boeing and SPEEA both regarded the Manpower Availability Conference as action "short of strike". (I.R. p. 14, lines 44-45; p. 15, lines 44-45; R. pp. 74-75.)

2. The Trial Examiner should have found that, prior to the discharge of Charles Pearson SPEEA had kept Boeing regularly notified of all arrangements made with respect to holding the MAC. (R. pp. 133, 199, 233, 260.)

3. The Trial Examiner erred in finding that if the MAC had been "successful" the damage to SPEEA would have amounted to millions of dollars. (I.R. p. 36, lines 8-27; R. p. 273.)

4. The Trial Examiner should have found that if the MAC had been successful the damage to Boeing would be speculative, depending upon such factors as the terms of compensation made available by firms invited to participate at the MAC, whether materially higher or lower than Boeing's, the number of openings available in such firms, if any, the desire or reluctance of employees to leave their established residence if the employment openings are elsewhere than in Seattle, and other factors.

(I.R. p. 36, lines 8-27; R. p. 273; R. p. 102-103.)

February 4, 1954.

Respectfully submitted,

HOUGHTON, CLUCK, COUGHLIN & HENRY,
Attorneys for SPEEA

United States of America
Before the National Labor Relations Board

Case No. 19-CA-806

BOEING AIRPLANE COMPANY, SEATTLE DIVISION, and SEATTLE PROFESSIONAL ENGINEERING EMPLOYEES ASSOCIATION

DECISION AND ORDER

On December 28, 1953, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent, the General Counsel, and the Union filed exceptions to the Intermediate Report and supporting briefs, and the Respondent and the Union requested oral argument. The requests for oral argument are hereby

denied as the record and the exceptions and briefs, in our opinion, adequately present the issues and the contentions of the parties.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and, finding merit in certain of the General Counsel's and the Union's exceptions, hereby adopts only such of the Trial Examiner's findings, conclusions, and recommendations as are consistent herewith.[2]

1. The Trial Examiner concluded that the Union-sponsored Manpower Availability Conference was an unprotected activity, and that the Respondent was therefore privileged to discharge Pearson because of his participation therein. We do not agree.

The material facts are substantially undisputed. Between April and December 1952, the Union, which had represented the Respondent's engineers since 1946, and the Respondent, were negotiating for a new contract. By the latter date they had reached an impasse on the subjects inter alia of base salary rates and rate ranges. As a substitute

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[1] The request of Engineers and Scientists of America for permission to submit a brief and to participate in oral argument is hereby denied as untimely filed.

[2] For the reasons set forth in their separate dissenting opinion, Members Rodgers and Beeson would adopt the Trial Examiner's recommendation that the complaint be dismissed.

for strike action in support of its demands, the Union attempted to organize the Manpower Availability Conference as a device for bringing together representatives of various employers who needed engineers, and engineers employed by the Respondent who desired or might desire to change employment. The stated purposes of the conference were to help such engineers obtain the best competitive offer, and possibly counteract the effect of the so-called Gentlemen's Agreement;[3] to help ascertain the true market price for engineers, for use in negotiations with the Respondent; and to put pressure on the Respondent by reducing the engineering services available to it. Pearson was selected by the Union to lead the organization and activation of the conference.

On about January 15, 1953, under the Union's name and over Pearson's signature as "Director Manpower Availability Service (Licensed and Bonded Employment Agent)," invitations to attend

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[3] The Gentlemen's Agreement was an agreement or understanding among the members of the Aircraft Industries Association, an association of approximately 80 companies in the aircraft manufacturing and related industries, including the Respondent, that they would not inter alia offer employment to any employee of a member of the Association without that member's express permission. We reject the Respondent's contention that the evidence adduced with respect to the impact of the Gentlemen's Agreement was inadmissible hearsay, and also reject its further contention that the impact of that agreement was not properly in issue in this proceeding.

the conference were sent to approximately 2800 employers of engineers. The invitations stated that their purpose was to put employers of engineers in contact with employed Union members who were dissatisfied with either their working conditions or their compensation, and were therefore available for new positions; the invitations pointed out that some of the Union's members were actively seeking new positions, while the interest of others would depend on the advantages to be gained from a change in employment. A copy of the invitation was sent to the Respondent, with a covering letter to Vice-President Logan, signed by the Chairman of the Union's executive committee, advising him that the Union was conducting the conference and had retained an agency to bring its members and prospective employers together. Logan was further advised that the purpose of the conference was to enable the Union members to bargain for their services, and to obtain for the Union data as to the true market value for engineers.

On January 27, 1953, Logan discharged Pearson because of his activities in connection with the Manpower Availability Conference. The Respondent's reasons, as presented to the Union, were in substance that the conference was a deliberate plan to create a situation in which substantial numbers of engineers would leave the Respondent; such a situation would be very damaging to the Respondent, particularly in view of the existing shortage of engineers; Pearson's activities in connection with the conference were against the Respondent's best

interests; and the Respondent was not required to continue paying a salary to an employee engaged in a program seriously damaging to it.

The Union's efforts to activate the conference were unsuccessful, and Pearson was ultimately reinstated by the Respondent.

The question presented by Pearson's discharge, in its context, is whether the Manpower Availability Conference, as a device for achieving the Union's lawful objectives, was a means entitled to the protection of the Act. In answering that question in the negative, the Trial Examiner weighed in the balance the worth of the objectives sought by the Union and the potentialities of damage to the Respondent and, finding the former outweighed by the latter, concluded that the Manpower Availability Conference ought to be characterized as indefensible and therefore unprotected. As authority for his rationale, the Trial Examiner appears to have relied largely on the Jefferson Standard Broadcasting case.[4] Although that case involved conduct characterized as indefensible, neither that case nor any other case under the Act supports a rationale which weighs potential benefits against potential damage, and arrives at a result predicated upon a subjective value judgment. Such an approach, moreover, presents the obvious danger that decisions

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[4] Jefferson Standard Broadcasting Company, 94 NLRB 1507, 1511-1512, affirmed sub nom. N.L.R.B. vs. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464, 475 et seq.

concerning the rights of employers and employees under the Act will be controlled by subjective feelings, rather than objective facts. Such a test we cannot accept.

The answer to the question can, however, be found by reference to the many Board and Court precedents establishing and delineating the rights and obligations of employers and employees in seeking to gain their legitimate economic objectives. The Manpower Availability Conference was initiated to achieve two principal objectives—for purposes of mutual aid or protection, to secure other employment for those Union members who desired to change employment, and possibly to counteract the effect of the Gentlemen's Agreement,[5] and for purposes of collective bargaining, to strengthen the Union's hand in its negotiations with the Respondent. No citation of specific cases is needed to establish that concerted activities for such purposes are presumptively lawful and protected. They do not lose their protection merely because they are novel; nor do they lose their protection solely because they may result in financial loss to the employer against whom they may be directed.[6] Such concerted activ-

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[5] Whether the Gentlemen's Agreement in fact restricted the employment opportunities of the Respondent's engineers is in our opinion immaterial to the issues of this case. Whether or not a concerted activity is protected does not depend on whether or not it is necessary.

[6] The classic example of a protected concerted activity—a strike—obviously may result in serious financial loss to the affected employer. See also

ities lose the protection of the Act, and those who participate in them become subject to disciplinary action, only when they contravene the policies of the Act, or some other basic public policy.

Activities which have been held to be unprotected or unlawful under these principles, or to warrant withholding the remedial provisions of the Act, have included such conduct as violence or threats of violence,[7] seizure of property,[8] attempts at unilateral dictation of terms of employment or other usurpation of working time,[9] interference between an employer and its customers while continuing to work,[10]

N.L.R.B. vs. Peter Cailler Kohler Swiss Chocolates Company, Inc., 130 F.2d 503, 506 (C.A. 2). It would seem moreover to be apparent that other normal and lawful activities of a union, such as the successful negotiation of a wage increase or other changes in terms and conditions of employment, may well involve an added financial burden to the employer.

[7] W. T. Rawleigh Company vs. N.L.R.B., 190 F. 2d 832 (C.A. 7).

[8] N.L.R.B. vs. Fansteel Metallurgical Corp., 306 U.S. 240.

[9] N.L.R.B. vs. Montgomery Ward & Company, Inc., 157 F.2d 486, 496-497 (C.A. 8); C. G. Conn, Limited vs. N.L.R.B., 108 F.2d 390, 397 (C.A. 7); Phelps Dodge Copper Products Corporation, 101 NLRB 360, 367-369; Underwood Machinery Company, 74 NLRB 641, 645-647.

[10] The Hoover Company vs. N.L.R.B., 191 F.2d 380, 386, 389-390 (C.A. 6) Montgomery Ward & Company, 108 NLRB No. 152; Jefferson Standard Broadcasting Company, supra.

engaging in harassing tactics,[11] intermittent work stoppages to win unstated ends,[12] and engaging in conduct which cast doubt on the Union good faith at the bargaining table.[13] But this Union's concerted activity, as expressed through the Manpower Availability Conference, was subject to none of these disabilities; nor did it otherwise contravene the policies of the Act or any other basic public policy. There was here in essence only a conditional threat that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bargaining demands, conduct which the Board, with Court approval, has held to be protected concerted activity.[14]

Moreover, here the Manpower Availability Conference was directly related to matters of collective bargaining in issue between the Respondent and the Union—notably wages, as to which an impasse had been reached in negotiations. And the nature of Pearson's conduct in connection with the Confer-

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[11] Textile Workers Union of America, CIO, et al. (Personal Products Corporation), 108 NLRB No. 109.

[12] International Union, U.A.W.A., A.F. of L., Local 232, et al., vs. Wisconsin Employment Relations Board, et al., 336 U.S. 245.

[13] Bausch & Lomb Optical Company, 108 NLRB No. 213.

[14] Southern Pine Electric Cooperative, 104 NLRB 834. Nemec Combustion Engineers, 100 NLRB 1118, 1123, enf. 207 F.2d 655 (C.A. 9), cert. den. 347 U.S. 917.

ence cannot be equated with the conduct involved in the cases relied on by the dissent. The vice of the employees' conduct in the Jefferson Standard Broadcasting case was that it involved a direct attack upon the employer and its business, unrelated to terms or conditions of employment or to any matter in issue between the union and the employer. In that case, striking union members circulated handbills vitriolically attacking the employer on the quality of its television broadcasts, calculated to solely injure the employer's business and omitting all reference to a labor controversy lest the disclosure of motive might hurt their cause in the eyes of the public. In the Hoover case, the union engaged in a boycott of the employer's products—likewise an action directed solely at injury to the Employer's business, and unrelated to any collective bargaining issue.[15] Here the employees collectively were seeking legitimate ends—to broaden their opportunities for employment, to obtain the best market for their services, and to lessen their dependence upon the Respondent for employment—all matters clearly, and properly, related to the issue of wages, then the subject of negotiation with the Respondent.[16] To hold, as the Trial Examiner con-

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[15] The Montgomery Ward case cited by the dissent involved an unlawful usurpation of working time. See footnote 9, supra.

[16] Member Murdock is disposed to believe that an important aspect of the vice which the courts found in the employees' conduct in Jefferson Standard Broadcasting and in Hoover was that it involved an

cluded and as our dissenting colleagues would hold, that such activity ought to be characterized as indefensible, and therefore unprotected, would in our opinion be an unwarranted extension of the doctrine involved in the cases on which they rely, and an unwarranted intrusion on the rights of employees as guaranteed in Section 7 of the Act. Such a step we are not prepared to take.

Under all the circumstances, we find that the Manpower Availability Conference was a concerted activity protected by Section 7 of the Act. As the Respondent discharged Pearson because of his participation in a protected concerted activity, it thereby discriminated against him to discourage union membership and activity, in violation of Section 8

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attempt by employees not on strike to interfere with the employer's efforts to sell the very same services or products which the employees were being paid to produce. Thus in the Jefferson case the Court agreed that employees had been discharged "for cause" who had made a "sharp, public, disparaging attack upon the quality of the company's product and its business policies." And in Hoover, although the goal was recognition of their union, the court said: "It is a wrong done to the company for employees, while being employed and paid wages by a company to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required under the Act to finance a boycott against himself." The instant case is distinguishable because it did not involve any disparagement or boycott of the employer's product or services—only a concerted effort by employees to obtain a better market for their services after an impasse in wage negotiations.

(a) (3) of the Act, and further interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1). Whether the Respondent's conduct be viewed as a violation of Section 8 (a) (3), or Section 8 (a) (1), or both, we further find that the remedy of back pay hereinafter provided will effectuate the policies of the Act.

2. We agree with the Trial Examiner that the Respondent did not refuse to bargain in violation of Section 8 (a) (5). Pearson's discharge resulted from the Respondent's good faith but mistaken belief as to its rights under the Act; such a discharge is therefore neither evidence that the Respondent was not bargaining in good faith, nor itself a refusal to bargain. In view of the Respondent's good faith bargaining concerning the discharge, following the event, we find it unnecessary to decide the extent of the Respondent's obligation, if any, to bargain before such a discharge.[17] In the absence of any evidence of bad faith we find, in agreement with the Trial Examiner, that the Respondent did not violate the Act in connection with the salary increase involved herein.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, occurring in connection with the operations of the

[17] S. D. Cohoon & Son, 101 NLRB 966, 967.

Respondent set forth in Section I of the Intermediate Report, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. As the Respondent's unfair labor practices resulted from its good faith but mistaken belief concerning its rights under the Act in a limited area, and there is nothing therein to suggest the likelihood of other types of violations of the Act, we shall order it to cease and desist only from engaging in the same or any like or related conduct.

We have found that the Respondent interfered with, restrained, and coerced its employees, and discriminated in regard to Pearson's hire and tenure of employment. Although Pearson has been reinstated, he is entitled to reimbursement for any loss of pay suffered as a result of the Respondent's unfair labor practices. We shall therefore order that the Respondent make him whole for any loss of pay suffered as a result of the Respondent's unfair labor practices by payment to him of a sum of money equal to that which he normally would have earned as wages during the period from the date of his discharge to the date of the Respondent's offer of

reinstatement, less his net earnings[18] during the same period. We shall also order the Respondent to make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.[19]

On the basis of the foregoing, the Board hereby strikes all reference to Section 8 (a)(1) and (3) from the Trial Examiner's Conclusion of Law numbered 3, and makes the following:

Supplemental Conclusions of Law

4. By discriminating in regard to the hire and tenure of employment of Charles Robert Pearson, thereby discouraging membership in Seattle Professional Engineering Employees Association, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

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[18] Crossett Lumber Company, 8 NLRB 440; Republic Steel Corporation vs. N.L.R.B., 311 U.S. 7.

[19] F. W. Woolworth Company, 90 NLRB 289.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Boeing Airplane Company, Seattle, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Seattle Professional Engineering Employees Association, or in any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Seattle Professional Engineering Employees Association, or any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole Charles Robert Pearson in the

manner set forth in the section hereinabove entitled "The Remedy;"

(b) Post at its plant in Seattle, Washington, copies of the notice attached hereto as Appendix A.[20] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order;

(d) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent

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[20] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted in the notice for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing An Order."

has taken to comply herewith.

It Is Hereby Further Ordered that except as otherwise found herein the complaint in this case be, and it hereby is, dismissed.

Dated, Washington, D. C., Sept. 30, 1954.

[Seal] GUY FARMER, Chairman
ABE MURDOCK, Member
IVAR H. PETERSON, Member
National Labor Relations Board

Members Philip Ray Rodgers and Albert C. Beeson, dissenting in part:

We dissent from the conclusion of our colleagues that the Respondent, in discharging Pearson, violated Section 8 (a) (1) and (3) of the Act. Although, like our colleagues, we cannot agree with the subjective approach of the Trial Examiner to this issue, we nevertheless believe that he reached the correct result because the Union's concerted activities, as expressed through the Manpower Availability Conference, contravened the basic policies of the Act.

The Trial Examiner concluded—and the majority does not dispute this conclusion—that the Union's activity, in seeking to facilitate the resignations of a substantial number of the Respondent's engineers, could have caused substantial damage to the Respondent's business. Moreover, contrary to the assertion of the majority, such damage cannot be equated with the losses potentially inherent in a

strike; for the damage caused by the Union's activities would have resulted from a permanent severance of the employer-employee relationship and not, as in a strike, from the mere temporary cessation of work. Pearson sought both to participate in the Union's activity and to continue to draw his pay from the Respondent. The Respondent discharged him because it did not believe it was required to finance such an injury to itself by continuing on its payroll an employee engaged in activities designed to induce other employees to sever their employment relationship. The Respondent's belief, in our opinion, was correct, and its action was wholly within its rights.

The situation presented by this case is not new—for the Board and the Courts have held that an employer is not required to finance an injury to itself by retaining on its payroll employees whose participation in concerted activities was directed toward injuring or destroying its business.[21] In affirming the Board's conclusion in the Jefferson Standard Broadcasting case, the Supreme Court stated, at pp. 472, 476:

> There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley

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[21] Jefferson Standard Broadcasting Company, 94 NLRB 1507, 1511-1512, affirmed sub nom N.L.R.B. vs. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464; The Hoover Company vs. N.L.R.B., 191 F.2d 380 (C.A. 6); Montgomery Ward & Company, 108 NLRB No. 152.

> Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise * * *
> * * * It [the employees' conduct] was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability * * *

In that case, the Supreme Court also quoted with approval the following language from the opinion of the Court of Appeals in the Hoover case:

> An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business * * *

In our opinion, these salutary principles are equally applicable to Pearson's discharge. We are not here concerned with the legitimacy of the Union's objectives, but rather with the illegitimacy of the means by which the Union sought to achieve those objectives. The Manpower Availability Conference was not a gathering together in concert of employees in order to compel the grant of a bar-

gaining demand by a temporary refusal to work; it was, rather, an employment agency operated under the aegis of the Union for the purpose of causing the permanent severance of the employment relationship. Such activity is the antithesis of the purposes of the Act, which seeks to strengthen the bonds of cooperation between employer and employee. It is equally as disloyal, equally as injurious to the employer's business, and equally as disruptive of industrial peace and stability, as the conduct which was condemned in the above-cited cases. Because it was conceived and utilized for purposes opposed to the purposes of the Act, the activities of the Manpower Availability Conference derive no protection from the guarantee of Section 7 of the Act. The Respondent's discharge of Pearson, because of his participation in such an unprotected activity, was accordingly not unlawful, and we would therefore dismiss the complaint in its entirety.

Dated, Washington, D. C., Sept. 30, 1954.

PHILIP RAY RODGERS, Member
ALBERT C. BEESON, Member
National Labor Relations Board

APPENDIX A

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Seattle Professional Engineering Employees Association, or in any other labor organization, by discriminating in regard to the hire or tenure of employment of our employees, or any term or condition of employment.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Seattle Professional Engineering Employees Association, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will make whole Charles Robert Pearson for any loss of pay suffered as a result of our unfair labor practices.

All our employees are free to become or remain or to refrain from becoming or remaining members of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment because of

membership in or activity on behalf of any such labor organization.

Dated.....

BOEING AIRPLANE COMPANY
(Employer)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In the United States Court of Appeals
for the Ninth Circuit

No. 14540

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the en-

tire record of a proceeding had before said Board, entitled, "Boeing Airplane Company, Seattle Division and Seattle Professional Engineering Employees Association," Case No. 19-CA-806 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating Maurice M. Miller, Trial Examiner for the National Labor Relations Board, dated June 23, 1953.

2. Stenographic transcript of testimony taken before Trial Examiner Miller on June 23, 24 and 25, 1953, together with all exhibits introduced in evidence.

3. Petitioner's[1] letter dated July 7, 1953, requesting extension of time to file brief.

4. Copy of Associate Chief Trial Examiner's telegram, dated July 9, 1953, to all parties granting extension of time to file briefs.

5. Petitioner's motion to correct transcript received July 24, 1953.

6. Trial Examiner Miller's Order correcting transcript issued on November 10, 1953, together with affidavit of service and United States Post Office return receipts thereof.

7. Copy of Trial Examiner Miller's Intermedi-

[1] Respondent before the Board.

ate Report and Recommended Order, dated December 28, 1953, (annexed to Item 16 hereof), and Order transferring case to the Board, dated December 28, 1953, together with affidavit of service and United States Post Office return receipts thereof.

8. Seattle Professional Engineering Employees Association's [2] (hereinafter called SPEEA) telegram, dated January 8, 1954, requesting extension of time to file exceptions and brief.

9. General Counsel's telegram, dated January 11, 1954, requesting extension of time to file exceptions and brief.

10. Copy of Board's telegram, dated January 12, 1954, to all parties granting extension of time to file exceptions and briefs.

11. Petitioner's request for permission to argue orally before the Board, dated January 16, 1954. (Denied. See page 1 of Decision and Order.)

12. General Counsel's exceptions to the Intermediate Report received February 1, 1954.

13. SPEEA's letter, dated February 4, 1954, requesting the Board to hear oral argument. (Denied. See page 1 of Decision and Order.)

14. Petitioner's exceptions received February 5, 1954.

15. SPEEA's exceptions received February 8, 1954.

16. Engineers and Scientists of America's telegram, dated April 7, 1954, requesting permission to

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[2] Charging Party before the Board.

file brief and participate in oral argument. (Denied. See footnote 1, page 1 of Decision and Order.)

17. Copy of Decision and Order issued by the National Labor Relations Board on September 30, 1954, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 9th day of November, 1954.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board

[Endorsed]: No. 14540. United States Court of Appeals for the Ninth Circuit. Boeing Airplane Company, a corporation, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review and Petition to Enforce Order of the National Labor Relations Board.

Filed: November 15, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14540

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF AND TO SET ASIDE, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Comes now Boeing Airplane Company (hereinafter referred to as "Boeing"), petitioner in the above entitled proceeding, by its attorneys, and petitions this Honorable Court to review and set aside, in part, an Order dated September 30, 1954, of respondent, National Labor Relations Board (hereinafter referred to as the "Board"), by which Boeing is aggrieved and its interests are adversely affected, and respectfully shows to the Court:

1. Boeing is a corporation, organized and existing pursuant to the laws of the State of Delaware, and maintains its principal place of business at Seattle, Washington. Boeing is engaged in the business of the production of aircraft, parts therefor and related productions, in various localities including King County, Washington.

2. This Court has jurisdiction of this proceeding pursuant to the provisions of Section 10(f) of the

National Labor Relations Act (49 Stat. 452) as amended by the Labor-Management Relations Act, 1947, 61 Stat. 146, 29 U.S.C. Section 131 et seq., as amended (hereinafter referred to as the "Act").

3. The nature of the proceedings as to which review is sought is as follows:

(a) On June 3, 1953, the General Counsel of the Board, on behalf of the Board, issued a Complaint against Boeing (Board Case No. 19-CA-806), based upon a Charge filed by Seattle Professional Engineering Employees Association, a labor organization (hereinafter referred to as "SPEEA"), which Charge was filed April 20, 1953 and amended May 19, 1953. The Complaint alleged that Boeing had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act. The Complaint included, in substance, allegations as follows:

(i) That Boeing and SPEEA were engaged in collective bargaining negotiations concerning the terms of a new agreement at certain times in 1952 and into the year 1953, and during such period, Boeing, in violation of the Act, discharged one of its employees, a Charles Robert Pearson, because of his activities as chairman of a committee formed by SPEEA to plan and operate a "Manpower Availability Conference" the purpose of which was to facilitate SPEEA's members in obtaining employment as engineers with companies other than Boeing;

(ii) That Boeing, in discharging Pearson and in

later offering to reemploy him, refused and failed to bargain in good faith with SPEEA in violation of the Act;

(iii) That on or about March 12, 1953, Boeing unilaterally put into effect wage increases for the employees represented by SPEEA in violation of the Act.

(b) On June 12, 1953 Boeing served and filed its Answer to the Complaint, admitting in such Answer that Boeing was engaged in commerce within the meaning of the Act; admitting that collective bargaining negotiations between Boeing and SPEEA had proceeded throughout the period mentioned in the Complaint; admitting that Boeing discharged Pearson because of his activities in connection with the Manpower Availability Conference; admitting that a purpose of such Manpower Availability Conference was to facilitate SPEEA's members in obtaining employment as engineers with companies other than Boeing; admitting its offer of reemployment to Pearson; alleging Pearson's acceptance of such reemployment, with restoration, as of the date of discharge, of Company Service and other benefits incident to Pearson's prior employment by Boeing; alleging by way of information that Pearson was employed by SPEEA throughout the period during which he was not in Boeing's employ; admitting that Boeing unilaterally had placed such wage increase in effect; alleging that such increase was less than the increase demanded by SPEEA and that it was made effective only after first having discussed such increase with

SPEEA and after having given notice thereof to SPEEA; but denying that Boeing had committed any unfair labor practices or violations of the Act whatever. Boeing's Answer further contained a timely charge against SPEEA, in which that organization was charged by Boeing to have refused to bargain collectively in good faith with Boeing, in violation of Section 8(b)(3) of the Act, by reason of SPEEA's organizing, promoting and operating the Manpower Availability Conference at the same time that collective bargaining negotiations were being conducted between the parties. No Complaint against SPEEA was issued by the Regional Director, based upon such charge, and no action whatever was taken with respect thereto, within the knowledge and information of Boeing.

(c) Pursuant to notice, a hearing was held on June 23, 24 and 25, 1953, at Seattle, Washington, before a Trial Examiner designated by the Board. On December 28, 1953 the Trial Examiner issued an Intermediate Report and Recommended Order in which it was concluded that Boeing had not engaged in any unfair labor practices as alleged in the Complaint and in which it was recommended that the Complaint against Boeing be dismissed in its entirety.

(d) On December 28, 1953 the Board issued its Order transferring the case to, and continuing it before the Board.

(e) On or about January 16, 1954, Boeing timely served and filed with the Board its Statement of Exceptions to Certain Findings and Rulings of the

Trial Examiner, challenging the propriety and legality of those of the Trial Examiner's rulings and findings considered to be adverse to Boeing, and at the same time filed its request, as did SPEEA, for permission to argue orally before the Board. As shown by the Board's Order, to which reference is hereinafter made, the Board denied such request for oral argument.

(f) The Board issued its Decision and Order in the case on September 30, 1954, a copy of which is annexed hereto and made a part hereof as Exhibit A, finding, in substance, that Boeing had not failed or refused to bargain in good faith with SPEEA; that Boeing had not acted in violation of the Act in granting such unilateral increase, but that Boeing had violated the Act in discharging Pearson because (in the view of the majority of the members of the Board) the activities of Pearson in connection with the Manpower Availability Conference leading to his discharge were to be regarded as concerted, protected activities under the Act. The decision relating to the propriety of Pearson's discharge was not unanimous, three members of the Board concurring on the majority opinion and two members of the Board dissenting. The Board's Order directs that Boeing reinstate Pearson with back pay, post the notice to which reference is made in the Order, and take other affirmative action.

4. The points upon which Boeing intends to rely for the relief herein requested are as follows:

(a) The conclusions of law upon which said Order is based, insofar as said Order relates to the

discharge of Pearson and the protected or unprotected nature of his activities in connection with the Manpower Availability Conference, are not supported by the findings of fact made by the Board and are erroneous, contrary to law and unsupported by the record of said proceeding considered as a whole.

(b) The Order is arbitrary and capricious and constitutes an abuse of discretion and exceeds the powers vested in the Board.

(c) The Order requires affirmative action by Boeing not warranted by the findings of fact and conclusions of law of the Board or by the evidence of record.

(d) Specifically, the Board's Decision and Order, insofar as it finds Boeing guilty of a violation of the Act in connection with the discharge of Pearson, is invalid and erroneous by reason of the following:

(1) In failing to find merit in Boeing's exceptions numbered 1 to 9, inclusive, to the Intermediate Report and Recommended Order.

(2) In failing to find the union-sponsored Manpower Availability Conference, to which reference is made in the attached Decision and Order, to be an unprotected activity under the Act.

(3) In refusing to rule that the evidence adduced with respect to the "Gentlemen's Agreement", to which reference is made in the attached Decision and Order, was inadmissible hearsay and beyond the scope of the issues in this case.

(4) In refusing to find that the activities of

SPEEA and its members in connection with the Manpower Availability Conference—particularly at a time when the parties were engaged in collective bargaining negotiations—constituted an unfair labor practice and a refusal to bargain in good faith on the part of SPEEA in violation of Section 8(b)(3) of the Act, and therefore could not, at the same time, have been protected activities under the Act.

(5) In finding that the Manpower Availability Conference did not contravene the policies of the Act.

(6) In finding that the Manpower Availability Conference constituted merely "a conditional threat that some of the respondent's employees would resign if the respondent did not meet the union's stated bargaining demands."

(7) In finding that the Manpower Availability Conference "was directly related to matters of collective bargaining in issue between the respondent and the union" rather than finding that it was a device primarily created to bring about a permanent exodus of Boeing's employees to other employers.

(8) In refusing to find that the conduct of SPEEA and of Pearson in connection with the Manpower Availability Conference was indefensible with respect to Boeing.

(9) In finding that Boeing discriminated against Pearson to discourage union membership and activity.

(10) In finding that Boeing interfered with, restrained or coerced its employees in the exercise of

rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) and in finding that Boeing was in violation of Section 8(a)(3) of the Act.

(11) In finding that the remedy of back pay will effectuate rather than contravene the policies of the Act.

(12) In finding that Pearson's discharge was improper, particularly after finding that Boeing had discharged its duty to bargain in good faith concerning such discharge.

(13) In directing that Boeing post the notice, a copy of which is attached to the Board's Decision and Order as Appendix A.

Wherefore, the petitioner prays:

1. That the respondent, National Labor Relations Board, be required in conformity with law to certify to this Court a transcript of the entire record in the proceeding wherein said Decision and Order was entered.

2. That said proceedings, findings, conclusions and Decision and Order be reviewed by this Court and that said Decision and Order be set aside, vacated and annulled insofar as such Decision and Order finds or concludes that Boeing has been or now is in violation of the Act, or directs any remedy based on any such finding or conclusion; and that the Board be ordered to dismiss in its entirety the Complaint against petitioner.

3. That this Court exercise its jurisdiction and grant to petitioner such other and further relief in the premises as the rights and equities in the cause

may require and to the Court may seem just and proper.

/s/ DeFOREST PERKINS,
/s/ WILLIAM M. HOLMAN

Of Counsel:
HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS

[Printer's Note: The attached Decision and Order is a duplicate of Decision and Order set out in full at pages 130-150 of this printed record.]

[Endorsed]: Filed Oct. 7, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND SET ASIDE ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Sec. 151, et seq.), herein called the Act, files this answer to the petition to review and set aside an order issued by the Board against Boeing Airplane Company, petitioner herein, and the Board's request for enforcement of said order.

1. The Board admits the allegations contained in paragraphs numbered 1 and 2 of the petition to review.

2. With respect to the allegations contained in paragraph numbered 3 of the petition to review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings and evidence, of the findings of fact, conclusions of law, and order of the Board, and of all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in paragraph numbered 4 of the petition to review.

4. Further answering, the Board avers that the proceedings had before it, and the findings of fact, conclusions of law, and order of the Board, were and are in all respects valid and proper under the Act, and pursuant to Section 10 (e) of the Act, respectfully requests this Honorable Court for enforcement of said order issued against petitioner on September 30, 1954, in the proceedings designated in the records of the Board as Case No. 19-CA-806, entitled "In the Matter of Boeing Airplane Company, Seattle Division and Seattle Professional Engineering Employees Association."

5. Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and filed with the Court a transcript of the entire record in the proceedings before it.

Wherefore, the Board prays that the Court enter

a decree denying the petition to review and enforcing in whole said order of the Board.

Dated at Washington, D. C., this 9th day of November, 1954.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed November 12, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY ON APPEAL

Boeing Airplane Company, Petitioner in the above entitled proceeding, hereinafter referred to as "Boeing", states in accordance with subdivision 6 of Rule 17 of the Rules of this Court, that on the appeal of the above entitled cause it intends to rely upon the points enumerated below. The National Labor Relations Board is hereinafter referred to as the "Board" and its Decision and Order issued on September 30, 1954, a copy of which is annexed as Exhibit A to the Petition for Review of and to Set Aside, in Part, an Order of the National Labor Relations Board, is hereinafter referred to as the "Order".

1. The conclusions of law upon which said Order is based, insofar as said Order relates to the dis-

charge of Pearson and the protected or unprotected nature of his activities in connection with the Manpower Availability Conference, are not supported by the findings of fact made by the Board and are erroneous, contrary to law and unsupported by the record of said proceeding considered as a whole.

2. The Order is arbitrary and capricious and constitutes an abuse of discretion and exceeds the powers vested in the Board.

3. The Order requires affirmative action by Boeing not warranted by the findings of fact and conclusions of law of the Board or by the evidence of record.

4. Specifically, the Order, insofar as it finds Boeing guilty of a violation of the National Labor Relations Act, as amended, in connection with the discharge of Pearson, is invalid and erroneous by reason of the followin:

(a) In failing to find merit in Boeing's exceptions numbered 1 to 9, inclusive, to the Intermediate Report and Recommended Order.

(b) In failing to find the union-sponsored Manpower Availability Conference, to which reference is made in the Order, to be an unprotected activity under the Act.

(c) In refusing to rule that the evidence adduced with respect to the "Gentlemen's Agreement", to which reference is made in the Order, was inadmissible hearsay and beyond the scope of the issues in this case.

(d) In refusing to find that the activities of SPEEA and its members in connection with the

Manpower Availability Conference—particularly at a time when the parties were engaged in collective bargaining negotiations—constituted an unfair labor practice and a refusal to bargain in good faith on the part of SPEEA in violation of Section 8(b)(3) of the Act, and therefore could not, at the same time, have been protected activities under the Act.

(e) In finding that the Manpower Availability Conference did not contravene the policies of the Act.

(f) In finding that the Manpower Availability Conference constituted merely "a conditional threat that some of the respondent's employees would resign if the respondent did not meet the union's stated bargaining demands."

(g) In finding that the Manpower Availability Conference "was directly related to matters of collective bargaining in issue between the respondent and the union" rather than finding that it was a device primarily created to bring about a permanent exodus of Boeing's employees to other employers.

(h) In refusing to find that the conduct of SPEEA and of Pearson in connection with the Manpower Availability Conference was indefensible with respect to Boeing.

(i) In finding that Boeing discriminated against Pearson to discourage union membership and activity.

(j) In finding that Boeing interfered with, restrained or coerced its employees in the exercise of rights guaranteed by Section 7 of the Act in viola-

tion of Section 8(a)(1) and in finding that Boeing was in violation of Section 8(a)(3) of the Act.

(k) In finding that the remedy of back pay will effectuate rather than contravene the policies of the Act.

(l) In finding that Pearson's discharge was improper, particularly after finding that Boeing had discharged its duty to bargain in good faith concerning such discharge.

(m) In directing that Boeing post the notice, a copy of which is attached to the Order as Appendix A.

Dated at Seattle, Washington, this 17th day of November, 1954.

/s/ DeFOREST PERKINS,
/s/ WILLIAM M. HOLMAN,
/s/ ROBERT S. MUCKLESTONE,
Attorneys for Petitioner, Boeing Airplane Company

Of Counsel:
HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS

[Endorsed]: Filed November 18, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINT RELIED UPON BY THE NATIONAL LABOR RELATIONS BOARD

The Board properly found that the activities of employee Pearson in connection with the Manpower Availability Conference were union or concerted activities protected by Section 7 of the National Labor Relations Act, and that by discharging him therefor the Company violated Section 8(a) (1) and (3).

Dated at Washington, D. C., this 24th day of November, 1954.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed November 29, 1954. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-806

In the Matter of BOEING AIRPLANE COMPANY, SEATTLE DIVISION, and SEATTLE PROFESSIONAL ENGINEERING EMPLOYEES ASSOCIATION

TRANSCRIPT OF PROCEEDINGS

Room 407, United States Courthouse Building, Seattle, Washington, Tuesday, June 23, 1953.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Maurice M. Miller, Esq., Trial Examiner.

Appearances: Paul E. Weil, Esq., and Robert Tillman, Esq., Seattle, Washington, appearing on behalf of the General Counsel. Jack R. Cluck, Esq., 525 Central Building, Seattle, Washington, appearing on behalf of Seattle Professional Engineering Employees Association. DeForest Perkins, Esq., and William M. Holman, Esq., Hoge Building, Seattle 4, Washington, appearing on behalf of Boeing Airplane Company, Respondent. [1*]

Trial Examiner Miller: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Boeing Airplane Company and Seattle Professional Engi-

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

neering Employees Association in Case No. 19-CA-806.

The Trial Examiner for the National Labor Relations Board is Maurice M. Miller.

Will counsel and other representatives of the parties please state their appearances for the record?

Mr. Weil: Paul Weil, Seattle, Washington, appearing for General Counsel, and Robert Tillman, Seattle, Washington, appearing for the General Counsel.

Mr. Cluck: Jack R. Cluck, appearing for Seattle Professional Engineering Employees Association.

Mr. Perkins: DeForest Perkins and William M. Holman of the firm of Holman, Mickelwait, Marion, Black and Perkins, representing the respondent, Boeing Airplane Company, Seattle Division.

Trial Examiner Miller: Since this is a formal hearing, we shall maintain the dignity and decorum which usually accompany judicial proceedings. Counsel should refrain from cross-table arguments, irrelevant comment, or discussion which does not promote the progress of the hearing. If you have a specific point which you wish to make, I ask that you address your remarks to the Trial Examiner or questions to the witness.

It is requested also that all persons present refrain from [3] smoking in this room while the hearing is in progress.

Statements as to the reasons for motions or objections should be specific and concise, but the Trial Examiner in his discretion will hear extended argu-

ment if requested. It is preferred that all such statements be made upon the record. Discussion off the record should be confined to procedural matters. Such discussion will not be included in the official transcript unless an appropriate order is issued by the Trial Examiner upon the request of a party or upon his own motion. All requests to go off the record should be directed to the Trial Examiner and not the official reporter. If you wish to discuss stipulations or matter pertaining to the issues, it is suggested that you ask for a recess rather than request discussion off the record.

During the course of the hearing the Trial Examiner may ask questions of the various witnesses. Representatives of the General Counsel and the other parties are free to object to any questions the Trial Examiner may ask, in the same manner and for the same reasons that you would object to similar questions on the part of opposing counsel.

The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questions.

An original and four copies of all pleadings and written [4] motions submitted during the hearing should be filed with the Trial Examiner. All exhibits offered in evidence should be in duplicate. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party who offered the exhibit to submit a copy before the close of the hearing. If such a copy is not submitted, any ruling receiving the exhibit

may be rescinded and the exhibit rejected, unless an order has been entered waiving this requirement for good reason shown, in the specific instance at issue.

The official reporter makes the only official transcript of these proceedings and all citations in briefs or arguments based upon the record, addressed to the Trial Examiner or the Board, must cite the official transcript in all references to the record. The Board will not certify any transcript other than the official transcript for use in court litigation. Proposed corrections of the transcript should be submitted to the Trial Examiner for his approval after the hearing, by stipulation or motion, within the time set hereafter for the submission of briefs. The parties will note that the official reporter is instructed to record all statements made while the hearing is in session, except when discussion off the record is ordered.

The Board has established a Branch Office of its Division of Trial Examiners at San Francisco, to which the present Trial Examiner is attached. The official reporter is advised, therefore, that the original transcript in this case and all exhibits [5] should be delivered to the Division's San Francisco Branch Office, Room 206, U. S. Appraisers Building, 630 Sansome Street, San Francisco, California. Briefs and motions or other communications, addressed to the Trial Examiner after the hearing, also, should be sent to him at the San Francisco Branch Office, in care of the Associate Chief Trial Examiner there. Motions, if submitted,

should be submitted in an original and four copies.

The Trial Examiner believes that oral argument, under most circumstances, is beneficial to his understanding of the contentions made and the factual issues involved. At the close of the hearing, therefore, the parties may be requested to argue orally. The Trial Examiner will feel free to participate in the discussion and to ask questions about the contentions of counsel or other representatives as to the issues, the facts, and the legal principles involved. The oral argument will be included in the official transcript. Any party shall be entitled, upon request made before the close of the hearing, to submit a brief or proposed findings and conclusions, or both, to the Trial Examiner. An original and four copies of such briefs or proposed findings and conclusions should be submitted early enough to make possible their receipt within twenty days after the close of the hearing or any earlier date set by the Trial Examiner, unless there are unusual circumstances which require a departure from this rule.

Meritorius requests for an extension of time to file the [6] briefs or proposed findings and conclusions should be addressed to the Associate Chief Trial Examiner at San Francisco. They should be submitted sufficiently to permit their receipt at least three days in advance of the date previously announced as the final date for the receipt of the briefs and other documents; if not, they will be considered untimely and will uniformly be denied. I make this announcement with respect to oral

argument, and the submission of briefs or proposed findings and conclusions, in order that the parties may schedule their activities accordingly.

Are you ready to proceed, Mr. Weil?

Mr. Weil: I am ready.

Trial Examiner Miller: Very well.

Mr. Weil: I would like the reporter to mark the formal pleadings as General Counsel's No. 1 for identification, please.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1 for identification.)

Mr. Weil: I would like to offer in evidence the formal papers in this proceeding as General Counsel's No. 1, consisting of the following papers:

No. 1-A, the charge against the employer signed by M. W. McCusker, filed on 4/20/53.

1-B the affidavit of service of the charge against the employer, mailed on 4/20/53, together with the return registered receipt. [7]

1-C, the amended charge against the employer, fiiled on May 19, 1953, signed by Mr. M. W. McCusker.

1-D, the affidavit of service of the amended charge against the employer dated 5/19/53, together with registered return receipt.

1-E, the notice of hearing in this case dated the 3rd day of June 1953 and signed by Thomas P. Graham, Jr., regional director.

1-F, the complaint in this proceeding, undated except for the date of the blank day of June 1953 and signed by Thomas P. Graham, Jr.

1-G, the affidavit of service of complaint, notice of hearing, and amended charge——

Mr. Perkins (interrupting): Does the General Counsel care to indicate a date at this time?

Mr. Weil: The date is June 3, 1953. The date was left out by error.

Mr. Perkins: Is it considered appropriate to insert that date?

Mr. Weil: I will move that as soon as I——

Mr. Perkins (interrupting): Excuse me.

Mr. Weil: 1-G, the affidavit of service, complaint, notice of hearing, dated June 3, 1953, together with registered return receipts. 1-H, the answer of respondent, Boeing Airplane Company, in the proceedings, dated the 11th day of June 1953, signed by Mr. Logan. [8]

1-I, the proof of answer of respondent, together with registered return receipts signed by DeForest Perkins, dated the 17th day of June 1953.

I would like to offer these in evidence at this time.

Mr. Perkins: May we examine the exhibit?

Mr. Weil: The other side is the duplicate file.

Trial Examiner Miller: Off the record while counsel are examining the exhibits.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Mr. Perkins: Respondent has no objection to the admission of these exhibits offered.

Trial Examiner Miller: Since there is no objection, General Counsel's 1-A through 1-I, inclusive, will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 1 for identification, was received in evidence.)

[see pages 1-19 incl.]

Mr. Weil: Mr. Examiner, at this time I would like to move to insert in the complaint in the formal pleadings the date June 3, 1953, so that the last paragraph of the complaint shall read, "On this 3rd day of June 1953".

Trial Examiner Miller: Any objection to the motion?

Mr. Perkins: I have no objection, with the understanding that the answer was served and filed in accordance with the rules.

Trial Examiner Miller: So understood, gentlemen. [9]

Mr. Weil: So understood.

Trial Examiner Miller: Very well, the motion to insert is granted.

Mr. Weil: I would like to move further that the designation of respondent on the formal papers be amended to read as follows: "Boeing Airplane Company, Seattle Division".

Trial Examiner Miller: Is there any objection?

Mr. Perkins: No objection.

Trial Examiner Miller: Since I hear none, the motion to amend the designation of the respondent company is granted.

Mr. Weil: I would like to move further that the complaint be amended in the following respects: That portion of paragraph 4 which appears on page 3 of the complaint referring to the expansion

of the unit by mutual agreement to include two additional classifications, be deleted and the word "expanded" where it appears in paragraphs five and six shall similarly be deleted.

Trial Examiner Miller: Any objection to the motion?

Mr. Perkins: No objection.

Trial Examiner Miller: Since I hear no objection, the motion to amend the complaint in the respect stated by Mr. Weil is granted.

Mr. Perkins: May we be clear on the exact language now that is taken out and the exact form of the complaint as it now stands? [10]

Mr. Weil: The exact form of the complaint as it now stands in respect to the last motion?

Mr. Perkins: Yes.

Mr. Weil: Paragraph 4, all that paragraph which appears on page 2 of the complaint, shall stand. All of that paragraph as it appears on page 3 shall be deleted.

Paragraph 5, the word "expanded", the second word in the paragraph, so that it shall read "the unit as described in paragraph 4", rather than "the expanded unit".

And paragraph 6 in the third line, it reads at present: "Respondent employees in the expanded unit", the word "expanded" deleted, and it will read, "Respondent employees in the unit described in paragraph 4".

I believe those are the only portions of the complaint that will be affected by the amendment.

Mr. Perkins: The Examiner's attention is in-

vited to the fact that we denied in respondent's answer the allegations that have now been deleted.

Is it considered necessary or desirable by the Examiner that respondent's answer be amended accordingly, or can it be understood that the answer in its present form can stand in that respect?

Trial Examiner Miller: I would be willing to have the record show that those portions of the respondent's answer which relate to the matter now stricken may be disregarded for the [11] purposes of this proceeding without the necessity of filing a formal amendment.

Mr. Perkins: That would be agreeable with respondent.

Trial Examiner Miller: Surely. The record will so show.

I can't recall now in the midst of the discussion whether I formally granted the motion. If I did not, the record will show that the motion is granted.

Mr. Weil: For the purpose of informing the parties at this time of the basis upon which this case is being presented——

Mr. Perkins (interrupting): Is that the conclusion of the formal instruments?

Trial Examiner Miller: Yes, I assume.

Mr. Weil: Yes.

Mr. Perkins: I have here a return of service on two subpoena duces tecum to Frederick D. Frajola and Edward McElroy Gardiner, respectively, which I would offer as part of formal papers on file in this case, if it is appropriate.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

During the period of discussion off the record, the Trial Examiner referred to the rules and regulations of the National Labor Relations Board, series six as amended, and its statement of procedure, specifically Section 102.31 of its rules and regulations, and upon such reference I have determined that it is not [12] necessary or does not appear to be necessary to make any formal showing upon the record at this time with respect to the return of service upon subpoena duces tecum issued in the name of a party to Board litigation in the absence of any question arising with respect to the propriety of the subpoena. Since there is no indication at this time that any such question will arise, I have suggested to Mr. Perkins during the discussion off the record that formal submission of the return of service for the record is not required at this time.

Mr. Perkins: I have no further comment, except to say that there are offered and are available at any time considered appropriate.

Trial Examiner Miller: Very well.

Mr. Weil: For the purpose of informing the parties at this time of the basis upon which the case is being presented by the General Counsel and to provide the Trial Examiner with a preview of the case to supplement the formal pleadings, I shall make an opening statement before going into evidentiary matters.

On or about April 2, 1952, the charging union, which is the recognized bargaining agent of the employees of the engineering department of respondent, addressed a letter to the respondent company opening the contract for negotiations in various respects and calling upon respondent to negotiate. From that time until the present, respondent and the union have met for the purposes of bargaining on various occasions. To cover the matter [13] briefly, the bargaining took the following course:

The SPEEA, union in this case, presented various data to the company at the first meetings and proposed that the data when studied would indicate that an increase of 28 to 36 per cent would be appropriate. After several meetings the company made an offer of an increase of six per cent which was rejected by SPEEA. Various counter proposals were made to an offer by SPEEA over the course of time between April 6, I believe the first meeting, and the time when the meetings ceased. No contract has been signed.

By the middle of July, that is, 1952, it became apparent that an impasse had been reached. At this time SPEEA took the viewpoint that the company had not been bargaining in good faith and that the six point proposal of the company had been unilaterally arrived at, that the company had failed to adduce any data to support its proposal, and had failed to inject the considerable amount of data which had been adduced by SPEEA.

Shortly thereafter, the parties called in a federal mediator who attended five meetings, after which,

I believe it was five meetings, after which the parties felt that the negotiations were proceeding in an orderly fashion and the services of the mediator were dispensed with.

After about a month and a half or two months of fruitless negotiating, SPEEA set in motion a plan to hold a conference entitled Manpower Availability Conference, with a dual purpose [14] of bringing economic pressure on the company in furtherance of its negotiating and of contacting other employers of engineers to try to put the employment of engineers on a competitive basis. Before the conference had come to fruition, the company discharged the chairman, Charles Robert Pearson, who had been appointed by SPEEA to manage the conference, because of his activities in that respect. This took place on or about January 27, 1953.

About the 2nd of March, the chairman, Pearson, was offered reemployment and was reemployed by management.

On or about March 12 respondent unilaterally put into effect a wage increase for the employees in the unit.

The pleadings have narrowed the issues to a considerable degree. The basic issue that confronts the Board at this time is whether the Manpower Availability Conference was a protected, concerted activity of SPEEA. If this is the case, and it is difficult to see how it could be otherwise, the discharge of Pearson must be an unfair labor practice in violation of 8 (a) (3).

In addition, and this is the second issue, by the

discharge of Pearson respondent discouraged and obstructed SPEEA in the economic action, namely, the Manpower Availability Conference, which SPEEA had undertaken to break the impasse. The re-employment of Pearson cannot be considered to have negated this assumption since his re-employment was accomplished by respondent with [15] notice to SPEEA that respondent had not changed its position in regard to the Conference.

It is implicit in the General Counsel's case that the impasse was not arrived at by good faith bargaining but whether or not the facts sustain this implication, the unlawful action of the respondent in discharging Pearson and interfering with the Conference negates the existence of good faith impasse at this point. By this action the company showed its contempt for the effectiveness of SPEEA and its purpose to undermine and render ineffectual SPEEA's negotiating on behalf of the employees in the unit. The company's action in refusing to permit Pearson to be represented by the appropriate union officers at the conference which ended in his discharge is a further indication of the company's intent to undermine the union.

With this background of unfair labor practices, of a bad faith impasse then in existence the company instituted a unilateral wage increase. This wage increase put SPEEA in a position where it was unable to continue to bargain effectively with respondent. The General Counsel submits, therefore, that respondent is guilty of violations of Section 8 (a) (1), (3), and (5) of the Act.

Trial Examiner Miller: Inasmuch as Mr. Weil has seen fit to provide an opening statement before we actually put General Counsel to the proof, I will ask if there are any comments on Mr. Weil's opening statement. [16]

Mr. Perkins: Has the Examiner had an opportunity to go over the complaint?

Trial Examiner Miller: I had an opportunity to go over the complaint but not your answer in detail.

Mr. Perkins: I comment to this effect, that I don't understand that the complaint as responded to by the answer in this case raises all of the issues that are mentioned in the opening statement of General Counsel. I have given very careful study to the allegations of the complaint and it seems to me that the allegations that point up the issues as expressed by the complaint are stated in paragraphs eight, nine, ten and eleven. And it seems to me that the reasonable interpretation of those paragraphs is to the effect that the alleged refusal to bargain or the alleged violation of 8(a) (5) begins with the discharge of Mr. Pearson, which is contended to be a 8 (a) (1), discharge, and that also the respondent refused to bargain and is guilty allegedly of a violation of 8 (a) (5) in that connection, and that the respondent's action toward Mr. Pearson in that respect are the actions that in view of General Counsel has been expressed by the complaint here, are the actions of the respondent that colored the collective bargaining negotiations in the alleged manner of a violation of 8 (a) (5).

I did not anticipate and I don't think that re-

spondent reasonably should have anticipated that we were going to search facts completely throughout the entire course of bargaining, [17] back to July of 1952, in order to determine, or partially determine, this matter of the alleged 8 (a) (5) violation, and, if so, it seems to me that you raise issues that are entirely extraneous from the issues expressed in the complaint relative to the inherent equity or fairness, objectively speaking, of the respective positions of the parties, and so forth.

If that is the intention here, it seems to me that now is an appropriate time to discuss it and determine the course of the proceeding from here on.

Trial Examiner Miller: I think the point as to the appropriateness of the time to discuss is well taken.

Mr. Weil, do you have any statement on behalf of the General Counsel in view of Mr. Perkins' observation?

Mr. Weil: As I understand Mr. Perkins' observation, his contention is that at this time it is a late time to allege that the bargaining prior to the discharge of Mr. Pearson was bad faith bargaining.

Does that summarize it?

Mr. Perkins: I think the first point is that your intention——

Mr. Weil: No, my intention is that I shall put in a certain amount of evidence as to the bargaining that took place during that period of time, eight months, as background material to show the background of negotiation between SPEEA and the company. I do not contend that that material

shows that the company has bargained in bad faith throughout that period. [18]

On the other hand, I certainly contend that that material shows that the company has or does not show that the company has bargained in good faith.

Mr. Perkins: That is anomalous to me, Mr. Examiner.

Mr. Weil: By that I mean I have not alleged specific bad faith in that course of bargaining up to this time, to Mr. Pearson's discharge, but because I did not allege it as specific bad faith bargaining, that does not mean that I am admitting that that was good faith bargaining, or that the evidence shows that the bargaining was done in good faith. What I have alleged is at the time of the discharge of Mr. Pearson, the impasse, good faith or bad faith impasse as the fact may show, was certainly shown to be in bad faith impasse, and from that time on with a bad faith impasse in existence, the unilateral wage increase was a further act of bad faith and the 8 (a) (5) allegation will be sustained.

Trial Examiner Miller: Do I understand you correctly, Mr. Weil, to take a position on behalf of the General Counsel which, if I understand correctly, boils down to this, that the action of the company in discharging Mr. Pearson transformed an impasse with respect to which the General Counsel takes no position as to bad faith situation.

Mr. Weil: That is correct.

Mr. Perkins: I am unaware, then, as to the pertinency of the events leading up to the impasse on

the point that is [19] mentioned by the Trial Examiner as to the transformation of such impasse into an 8 (a) (5) situation.

Trial Examiner Miller: To restate the assumption implicit in my last question to which Mr. Weil, if I understand him correctly—he may correct me if I am wrong—the issue as Mr. Weil has posed it, and which we are now considering seems to boil down to this: Negotiations did occur; that the General Counsel expects to adduce evidence with respect to negotiations not for the purpose of proving any contention as to their good faith or bad faith character, but merely as part of the course of events with which we are concerned. The General Counsel's position, if I understand Mr. Weil correctly, is that the complaint is not intended to characterize their negotiations as negotiations in good faith or negotiations in bad faith, but merely as to acknowledge them as having occurred. General Counsel, if I understand Mr. Weil correctly, acknowledges that an impasse was reached, and that the actions of the company with respect to the discharge of Mr. Pearson insofar as the General Counsel is concerned, injected bad faith into the situation. That is what I understand your contention to be.

Mr. Weil: Correct.

Trial Examiner Miller: Does that formulation of the issues raise any substantial issue as far as the respondent is concerned with respect to the adequacy of the complaint or the form of the complaint? [20]

Mr. Perkins: I think for the purpose of the record, prudently I should say that I don't believe that the complaint reasonably interpreted indicates that the period previous to the impasse is important or germane to the violation or alleged violation by the respondent of 8 (a) (5) or 8 (a) (3) or 8 (a) (1) with respect to the case of Mr. Pearson.

Trial Examiner Miller: At this point I am wondering, from how the discussion is proceeding, whether we have reached a point where further explanation as to the form of the complaint is necessary or would be fruitful.

Mr. Perkins: I want to ask this question: Is the Trial Examiner's expression of the General Counsel's position here regarded as correct by representatives of the General Counsel?

Trial Examiner Miller: Mr. Weil so indicated to me.

Mr. Weil: I indicated that.

Mr. Perkins: I am not requesting an amendment of the answer as such at this time, or the amendment to the complaint at this time as such, but I would like to reserve my objection on that until such later time, depending upon the scope of the evidence that is sought to be adduced by the General Counsel, and I also, now, naturally, will register any objections that I feel are appropriate on the matter of materiality of the evidence sought to be adduced to the issues expressed by the complaint as admitted and denied by the answer.

Trial Examiner Miller: Certainly. So understood. [21]

Mr. Weil, you may proceed.

Mr. Weil: I would like to call at this time Mr. Pearson.

CHARLES ROBERT PEARSON

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Would you give us your full name and address, please, Mr. Pearson?

A. Charles Robert Pearson, 19725 Marineview Southwest, Seattle 66, Washington.

Q. What is your occupation?

A. I am an engineer presently employed as an engineering designer.

Trial Examiner Miller: With the Boeing Airplane Company?

The Witness: With Boeing Airplane Company, Seattle Division.

Q. (By Mr Weil): Are you a member of SPEEA? A. Yes.

Q. Have you been active in SPEEA affairs?

A. I have been active in SPEEA affairs.

Q. In what respect have you been active in SPEEA affairs?

A. I have served on the Action Committee. I was the chairman of the Manpower Availability Conference Committee, and presently of the Employment Committee.

Q. As a member of the Action Committee, did you treat with the Manpower Availability Conference?

(Testimony of Charles Robert Pearson.)

A. I was present and took part in a considerable portion of the discussion of the Manpower Availability Conference within the Action Committee.

Q. When did you first hear about the MAC?

A. The MAC had been mentioned as a possible instrument of pressure in discussion of negotiations of the previous contract year. This was presented to the general membership meeting on or about November 1951. No action was taken at that time since the contract with the company was imminent.

Q. Whose idea was it, if you can recall?

A. I was not a member of the committee at that time.

Q. I see. Perhaps at this time it would be a good idea for you to tell us what the Manpower Availability Conference was, what its purpose was, how it was expected to take place.

A. The Manpower Availability Conference was conceived as a meeting place wherein the engineering members of SPEEA would be brought into contact with prospective employers of engineers to assist SPEEA members in obtaining jobs elsewhere, and thereby exert economic pressure upon the Boeing Airplane Company in the furtherance of the collective bargaining associations.

Q. What is the general manner in which matters brought up in a committee like the Action Committee are presented to the membership?

A. The Action Committee explored possible means or devices as to their effectiveness or con-

(Testimony of Charles Robert Pearson.)

jectured effectiveness in collective [23] bargaining negotiations, and after discussion and development within the committee, these possible actions were proposed to the Executive Committee for their consideration before there was any contact with the members concerning those proposals.

Q. You say the Action Committee explored possible actions. What was the purpose of such actions in reference to the negotiating?

A. Well, the action explored and discussed were actions to——

Mr. Perkins (interrupting): May I just ask for clarification, negotiating with whom and what?

Mr. Weil: Negotiations between SPEEA and Boeing Airplane Company, Seattle Division.

Mr. Perkins: Thank you.

The Witness: I have lost the train of thought.

Mr. Perkins: May we hear the answer, then?

Trial Examiner Miller: Would you restate the question, please?

Q. (By Mr. Weil): You stated that you explored possible actions in the Action Committee with respect to the negotiations being conducted between SPEEA and the Boeing Airplane Company. What was the purpose of exploring possible actions, of what nature?

A. The purposes of these actions would be to exert economic pressure upon the company in the furtherance of SPEEA's position in the negotiations. [24]

Q. The MAC having been discussed by the Ac-

(Testimony of Charles Robert Pearson.)

tion Committee, was it then reported to the Executive Committee? A. Yes.

Q. When? When was it first reported to the Executive Committee?

A. I don't believe I recall.

Q. Was it during the time of these prior negotiations that you mentioned when it was first discussed in the Action Committee?

A. It was undoubtedly discussed in the Action Committee before I was a member of that committee, several months previously.

Q. When did you become a member of the Action Committee? A. In the summer of 1952.

Q. I see. After you became a member of the Action Committee, did the Action Committee report on the MAC to the Executive Committee?

A. Yes.

Q. When was that?

A. In July or August of 1952, I believe.

Q. How was such a report made?

A. It was made in a meeting at which I was not present. It was made perhaps in writing.

Q. You were not present at that meeting?

A. I was not present.

Q. Was it made as a result of determination by the Action Committee that it should be presented to the Executive Committee? A. Yes. [25]

Q. Did the Action Committee, after you became a member of it, report on the MAC to the membership of the organization?

A. Yes. The Action Committee report to the

(Testimony of Charles Robert Pearson.)

general membership meeting included the suggestion or the developed idea of Manpower Availability Conference with other proposals.

Q. When was this?

A. I believe it was in September, or, perhaps, August.

Q. This was September of what year?

A. 1952.

Q. At that time were negotiations being conducted with the employer, Boeing Airplane Company?

A. Yes, negotiations had been in progress.

Q. Who made this report on behalf of the Action Committee?

A. The report was presented to the general membership meeting by Mr. Dan Hendricks, who was at that time a member of the Action Committee.

Q. Was any action taken by the Executive Committee pursuant to the report?

Trial Examiner Miller: Are you speaking now of the period of time prior to the report to the membership or before?

Mr. Weil: I haven't determined which was which, whether the membership report was prior to the executive report or not.

Trial Examiner Miller: Very well.

A. This report was given to a membership meeting which is a small portion of the total membership, and at that meeting there [26] was a proposal made from the floor that the report be published and distributed to the entire membership,

(Testimony of Charles Robert Pearson.)

and the Executive Committee didn't do this at first, but later did take it under consideration. I am not clear on the action of the Executive Committee with regard to the report.

Q. (By Trial Examiner Miller): There is a latent question here, Mr. Pearson, that was in my mind when I made my last remark to Mr. Weil, and that is this: You have mentioned previously that the Action Committee having discussed the possibility of a Manpower Availability Conference, and having more or less formulated the idea, had communicated its thoughts on the idea to the Executive Committee of SPEEA. A. Yes, sir.

Q. You also testified to, with respect to, a report of the Action Committee, to a general membership meeting presented to Mr. Hendricks. A. Yes.

Q. The question was in my mind at the moment, do you have any personal knowledge of anything done by the Executive Committee between the time when the Action Committee first discussed this idea informally with the Executive Committee and the date of the membership meeting? A. No.

Q. If the times indicated in your previous testimony are correct, then the idea was communicated to the Executive Committee sometime [27] in July or August of '52, and the report to the membership meeting was made in August or September, the gist of your testimony, as I understand it, would then be that you have no knowledge as to whether between the first of those incidents and the second incident there was any specific action by the Ex-

(Testimony of Charles Robert Pearson.)

ecutive Committee or decision of the Executive Committee of the organization.

A. I don't know the mechanics of the Executive Committee's consideration.

Q. But your last answer before I assumed this line of examination was to the effect that after the membership committee meeting that the Executive Committee did something about the suggestion in the nature of publishing it to the membership.

A. I believe that is correct.

Trial Examiner Miller: Go ahead.

Q. (By Mr. Weil): Along that same line, now, was the Action Committee ordered to publish this report to the membership?

A. I don't recall that.

Q. Who published a report to the membership, or was one published on the MAC?

A. I am not even sure of that.

Q. You are not sure of what, who did it, or what was done?

A. I am not sure if I remember the details.

Q. Did the Action Committee continue to work on the MAC at that time?

A. The Action Committee considered and developed the proposed action, considered the mechanics of how it might be done.

Q. In this consideration what was decided should be done? In other words, tell us what the Action Committee did with the MAC plan during the time you were a member of the Action Committee.

A. The Action Committee tried to develop it

(Testimony of Charles Robert Pearson.)

into a workable instrument of pressure and studied the detail mechanics of how it should operate.

Q. What detailed mechanics did the Action Committee come up with? In other words, what did you decide as a committee?

A. I don't understand what you are getting at.

Q. Assuming that the Action Committee at some time, or assuming that the MAC at some time was ready to actually be put into motion, there must have been some planning done, some steps taken, by somebody, at some time, to take it from an idea to an accomplished fact. That is what I want you to go into.

A. There was a lot of planning, organization, and the Executive Committee appointed a Manpower Availability Conference Committee to pursue the development of those plans further.

Q. When was this?

A. I believe it was September of 1952.

Q. Were you appointed a member of that committee?

A. I was appointed the chairman of that committee.

Q. The MAC Committee? A. Yes.

Trial Examiner Miller: Was this before or after the membership [29] meeting at which Mr. Hendricks presented his report?

The Witness: It was after that.

Q. (By Mr. Weil): Was Mr. Hendricks a member of the Action Committee?

A. Yes, he was a member of the Action Com-

(Testimony of Charles Robert Pearson.)

mittee at the time the report was made, yes. He was not a member of the Manpower Availability Conference Committee.

Q. Was he a member of the Executive Committee? A. No.

Q. Just a member of the Action Committee. In the formation of the MAC for use, did the Action Committee do all of the actual preparation of documents and mailing lists, and so forth, and so on, or did the MAC Committee take care of that?

A. That was done subsequently by the MAC Committee.

Q. At the time the MAC Committee was formed and there was nothing done except the preliminary?

A. Preliminary language.

Q. The plan of action?

A. The preliminary planning was as to how such conference could be operated.

Q. Then after the MAC Committee took over the planning of this MAC, what steps were taken by them? Just go through.

A. The Mac Committee, there were several subcommittees appointed. Those committees worked. One of the committees was assigned to the compilation of the mailing list, other committees were assigned [30] for the development of forms for collecting data. A committee was assigned the problem of investigating the procedures. A committee was assigned to investigate the facilities required and how those facilities might be obtained.

(Testimony of Charles Robert Pearson.)

Q. Did all of these committees do the work to which they were assigned?

A. Substantially, yes.

Q. To whom did these committees report?

A. They reported to me.

Q. At the time the MAC Committee took over the MAC, was the Action Committee entirely supplanted in regard to MAC? Did they have any further to do with them?

A. The Manpower Availability Conference as one of the proposed actions of the Action Committee was removed from the jurisdiction of the Action Committee.

Q. What happened to the Action Committee after that? A. It is still in operation.

Q. It is still in operation with what end in view?

A. As original development of actions that might be used to further the ends of SPEEA.

Q. Inasmuch as these committees reported to you, perhaps you can answer. Tell us what evolved from the action of the mailing list committee?

A. A card file of approximately 2800 names and addresses of employers of engineers. [31]

Mr. Weil: May we go off the record for a few minutes?

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

We are in recess for five minutes.

(Short recess.)

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: The hearing will be in order.

Q. (By Mr. Weil): Can you tell me how this card file was gathered, where the names came from that are in the card file?

A. This compilation was accomplished by a committee of approximately a dozen men who searched in their assigned fields, the technical or trade journals in which the advertisements for engineers appear. There was no source of any standardized mailing list. This mailing list was intended to include all prospective employers of engineers and very definitely those who were advertising.

Q. The second committee you mentioned, the committee on forms for the collection of data, what sort of forms did they undertake to improvise?

A. One was a form to be submitted by each engineer attending the conference for reporting to SPEEA any offer that he may have received, what company, keyed with information on his background as to what his particular field was and his experience. There was also a form of acceptance that we intended to obtain, a form for acceptance data which we intended to obtain from those [32] men accepting jobs as a result of the Manpower Availability Conference.

Q. The only forms of data that this committee was interested in?

A. Also the preparation of an admission ticket form. There was some consideration of an agreement form wherein the engineer in presenting his

(Testimony of Charles Robert Pearson.)

admission would agree to abide by the rules of the conference.

Q. You mentioned the committee to investigate licensing procedure. Would you tell us about that committee?

A. This committee actually turned out to be a committee of one. The man contacted the city clerk and controller's office to obtain information as to whether a license was necessary, and to obtain the city ordinance pertaining to employees agency licensing, and the informal questioning regarding the necessity of obtaining a license for this type of operation.

Q. What information did he obtain?

A. His advice was that the license probably would not be necessary since the Manpower Availability Conference was to be self-liquidating or nonprofit.

Mr. Perkins: I must object to that. That is hearsay.

Trial Examiner Miller: The objection is sustained.

Mr. Perkins: May we have that remark stricken?

Trial Examiner Miller: It will be disregarded upon my sustaining the objection. [33]

Mr. Perkins: Thank you.

Q. (By Mr. Weil): What information concerning licensing procedure did the committee report to you, or the individual who comprised the Committee, I should say?

A. This sub-committee actually presented a copy

(Testimony of Charles Robert Pearson.)
of the city ordinance to me which was studied in committee at great length.

Trial Examiner Miller: When you say the city ordinance, would that be the city ordinance of the City of Seattle?

The Witness: Yes, it would.

Q. (By Mr. Weil): What deduction did you arrive at from the study of, the MAC Committee arrive at, from the study of this information?

Mr. Perkins: Objection. I believe that is calling for a conclusion, Mr. Examiner.

Mr. Tillman: It is a basis for future action by the chairman.

Trial Examiner Miller: I will permit the question.

The Witness: Would you repeat the question, please?

(Question read.)

A. It was deduced that a license was probably not necessary inasmuch as the conference was to be a non-profit operation.

Q. (By Mr. Weil): As a result of that deduction was licensing then dropped by the committee as a consideration?

Mr. Perkins: In an effort to avoid interrupting, may my objection be regarded to be a continuing objection to this type [34] of examination, as to the deductions and the conclusions of Mr. Pearson or the committee to which reference is made here as to the legal effect of the Seattle city ordinance?

I understand the Examiner has permitted the

(Testimony of Charles Robert Pearson.)

first question. I don't want to repeat the need for the ruling.

Trial Examiner Miller: I am rather reluctant to permit a continuing objection to testimony by way of conclusion, because that comes up possibly throughout the record. I will permit an objection to a continuing examination on a particular subject matter.

Mr. Perkins: The objection I have in mind is so intended.

Trial Examiner Miller: Very well, you will have a continuing objection to the examination along the line so far as laid out with respect to the effect of the ordinance and the actions of the committee taken with respect to the ordinance.

The objection is overruled.

Mr. Perkins: Thank you.

Mr. Weil: I think it would be well if you repeated the question.

(The question was read as follows:

"Q. As a result of that deduction was licensing then dropped by the committee as a consideration?")

A. Licensing was not dropped, it was decided that a license would provide insurance against a possible violation of the city ordinance before the license was obtained. [35]

Q. (By Mr. Weil): When was the license obtained?

A. The license was applied for on January 2, or about January 12, they appeared before the City

(Testimony of Charles Robert Pearson.)

Commission and the license was not granted at that time pending a report from the police department of the City of Seattle.

Q. What year? A. 1952.

Trial Examiner Miller: '52 or '53?

The Witness: '53. Excuse me.

Q. (By Mr. Weil): Was the license subsequently granted?

A. The license was subsequently granted at a time when I was out of the city.

Q. Who was the individual licensed, or was the group as a whole licensed?

A. Inasmuch as SPEEA was neither a person, partnership or a corporation, it was therefore not competent to obtain a license. The actual license was issued to Charles Robert Pearson, director of Manpower Availability Service, Seattle Professional Engineering Employees Association, Arcade Building, Seattle.

Q. Was the Executive Committee informed of the action of the Manpower Availability Conference Committee in regard to the licensing?

A. The license was obtained upon specific instructions received from the Executive Committee, and a member of the Executive Committee accompanied me in making application and in appearing [36] before the City Council.

Q. You mentioned the committee on facilities. What did that committee make up?

A. That committee's job was primarily one of investigation, since it could not be determined the

(Testimony of Charles Robert Pearson.)

full extent of facilities which would be necessary until response to the invitations were received, but the facilities committee did conduct extensive investigation as to what facilities might be available when the time and requirement arrived.

Trial Examiner Miller: Do I infer correctly, Mr. Pearson, that you are talking about physical facitilies in which persons could assemble?

The Witness: Correct, that is correct.

Q. (By Mr. Weil): Which committee, if any, drew up the invitation to the MAC?

A. They were members of the Manpower Availability Conference Committee, perhaps the chairman of the Action Committee, and others contributed thoughts in relations, suggestions, but the invitation was basically my work as a member of the committee. This form of invitation had been submitted to the Executive Committee in earlier draft and had been approved.

Q. The Committee on Forms for the collection of data, you testified worked out various forms, among which was a form, which was a form which was circulated to the membership to apprise them of the committee. Perhaps you can tell us what that form [37] included and what the purpose was.

A. The forms to which I had reference were never completed. It was mentioned as an assignment of committees to develop—for obtaining the data which was a partial objective of the conference.

(Testimony of Charles Robert Pearson.)

Q. Those forms were never submitted to the membership, is that correct?

A. No, those forms were never completed.

Q. Was any submission to the membership made of any data or questionnaires or similar papers by the MAC Committee?

A. Before the actual formation of the MAC Committee there was a questionnaire ballot form submitted to the entire membership. Further consideration of the Manpower Availability Conference as a non-strike action was based upon the results of that polling of the membership.

Mr. Weil: May we go off the record?

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

At this time, pursuant to an understanding previously reached, we will recess until 1:15 this afternoon at the same place.

(Whereupon, a recess was taken until 1:15 o'clock p.m.) [38]

After recess.

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 1:15 o'clock p.m.)

Trial Examiner Miller: The hearing will be in order.

CHARLES ROBERT PEARSON

resumed the stand, having been previously sworn, and testified further as follows:

Further Direct Examination

Mr. Weil: I think it might be in order if you would read the last question and answer, please.

(The question and answer were read as follows:

"Q. Was any submission to the membership made of any data or questionnaires or similar papers by the MAC Committee?

"A. Before the actual formation of the MAC Committee there was a questionnaire ballot form submitted to the entire membership. Further consideration of the Manpower Availability Conference as a non-strike action was based upon the results of that polling of the membership.")

Mr. Weil: I will ask the reporter to mark this and identify this as General Counsel's No. 2, please.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Mr. Weil: I will ask the reporter to mark this as General Counsel's No. 3 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.) [39]

Q. (By Mr. Weil): Showing you General Counsel's No. 2 for identification, is that the submission that you made to the membership?

(Testimony of Charles Robert Pearson.)

A. Yes, that is the submission we made to the membership, including the ballot polled.

Mr. Weil: I offer this as General Counsel's Exhibit No. 2.

Trial Examiner Miller: Is there any objection?

Mr. Perkins: Respondent objects to the admission of the exhibit marked for identification No. 2, to the extent that it refers to a so-called "gentleman's agreement".

Now, I appreciate that the Trial Examiner may not be as acquainted as the parties here with the terminology which was used in the manner that we refer to by titles that have been used frequently in the past by the parties, but in view of that it may be an appropriate time now to discuss the pertinency of that matter with the Trial Examiner and determine the position of the Trial Examiner with respect to the relevancy and materiality of any evidence in this case related to the so-called "gentleman's agreement".

To the extent that the offered exhibit does not refer to that, I have no objection.

Trial Examiner Miller: I would like, in view of your observations, Mr. Perkins, I would like to have an opportunity to study the exhibit to determine the connection in which this reference appears. [40]

I have rather hastily read the exhibit. Insofar as I can determine, Mr. Perkins, the only reference to a "gentleman's agreement", is in the second para-

(Testimony of Charles Robert Pearson.)

graph on the first page of the offered exhibit under the heading "General Plan".

Mr. Perkins: I think that is correct.

Trial Examiner Miller: Yes.

On what ground do you feel that the exhibit is objectionable because of its reference? I mean in the light of the circumstances under which the exhibit has been offered, and the state of the record up to this time, is not any reference to the so-called "gentleman's agreement" a matter which, if it needs clarification, one which can be developed in cross examination, or as a matter of the company's case in chief?

Mr. Perkins: It can be so developed, but we consider it to be entirely extraneous to the issues in this case and, therefore, that we should not be in a position where we have to go into the matter as part of cross examination. Our comment goes to its appropriateness in the case at all.

Trial Examiner Miller: Mr. Weil, any comments?

Mr. Weil: Only this, the fact that it appears there that anything that appears on that form in regard to the "gentleman's agreement" I would say is a certain indication of the validity of the appearance of the "gentleman's agreement" in this case. The "gentleman's agreement" the General Counsel contends is one of the factors which lead to the action taken in this case. It [41] is one of the factors that has been arising throughout the course of bargaining. It is one of the features to

(Testimony of Charles Robert Pearson.)
which the union has objected and about which some of the negotiating sessions have concerned themselves. I believe it is inseparable from the issue as presented.

Mr. Perkins: We contend that it isn't properly a part of the issues, but through an attempt to suggest the method of proceeding with this hearing may I suggest in that connection that there is nothing before the Trial Examiner at this time on that point. That is, there has been no definition in these proceedings as to what the General Counsel contends the so-called "gentleman's agreement" to be. And absent such a definition, and actually absent any facts in the record which would throw any light on what the contention of the General Counsel is, I withdraw my objection. But I didn't want to be in a position of being later inconsistent when evidence was introduced or offered as to what the contention of the General Counsel is with respect to the gentleman's agreement, and at that time be inconsistent and thereby not properly in a position to preserve my complete objection to this gentlemen's agreement as a factor in the case, or as an issue, on the grounds of its relevancy and its materiality.

Trial Examiner Miller: Very well, I think I understand your problem.

At this time I will overrule the partial objection to [42] General Counsel's 2 and order that it be received in evidence as offered. However, my action in doing so preserves to the respondent company

(Testimony of Charles Robert Pearson.)
the full benefit of its position in that matter, and you will be fully at liberty when the matter arises in testimonial form to pursue any contention that you wish to make with respect to the appropriateness of it in regard to the gentlemen's agreement.

The exhibit is received.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification, was received in evidence.)

[See page 477.]

Q. (By Mr. Weil): Mr. Pearson, are you familiar with the result of the balloting or the result of the poll made by this ballot?

A. The results of the poll were reported to the Executive Committee and those results were reported to the membership by an area news representative, news letter.

Q. Can you tell me offhand what the results were, approximately?

A. The results were some 800 replies received overwhelmingly in favor of holding the Manpower Availability Conference.

Q. Can you tell me offhand how many, percentagewise, how many of the persons who returned this ballot pledged the first pledge, that is, to attend this conference, "I pledge to attend this conference. I desire to change companies and authorize the Executive Committee to notify Boeing of my intention not more than two weeks prior to the conference."

(Testimony of Charles Robert Pearson.)

Mr. Holman: Counsel, couldn't we stipulate as to the results of these polls? [43]

Mr. Weil: I don't know what the results are. I'm looking for the newsletter.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Discussion off the record indicates that the parties are ready to stipulate with respect to the pending question. I understand that Mr. Weil is prepared to state the stipulation.

You may proceed.

Mr. Weil: It is stipulated that in answer to pledge number 1, which I have already read into the record, the total of 872 responses, 10 individuals signed pledge number 1.

Mr. Perkins: My suggestion was that we identify the pledge descriptively by the nature of the pledge.

Mr. Weil: I just read that one in. In my question I read the entire pledge number 1 in. However, I will read it in again.

Mr. Holman: How about repeating it for stipulation?

Mr. Weil: That pledge is stated as follows: "I pledge to attend this conference. I desire to change companies and I authorize the executive committee to notify Boeing of my intention not more than two weeks prior to the conference".

Mr. Hilman: Did we get the percentages and the names, the number?

(Testimony of Charles Robert Pearson.)

Mr. Weil: Yes.

Trial Examiner Miller: He mentioned the number but no [44] percentage.

Mr. Weil: One, 15 per cent.

Mr. Holman: That is 10 names?

Mr. Weil: Ten names.

Pledge No. 2, "I pledge to attend this conference and I desire to change companies, but I desire not to disclose my intention to Boeing."

Eighty-six responses, percentage 9.86 per cent.

Pledge No. 3, "I pledge to attend this conference but do not necessarily desire to change companies at this time (those signing this pledge may not be called upon to attend if facilities and time do not permit)". Four hundred twenty, a percentage of 48.28.

Pledge No. 4, "I am willing that the conference be conducted but I will not participate." Three hundred twenty-one votes, percentage of 36.82.

And No. 5, "I desire that no conference be conducted". Thirty-four votes, percentage 3.89.

Mr. Perkins: Respondent is so willing to stipulate.

Trial Examiner Miller: Very well, on that statement of the stipulation.

Mr. Cluck?

Mr. Cluck: We stipulate.

Trial Examiner Miller: Very well, the stipulation is noted for the record.

Mr. Perkins: May it also be stipulated that

(Testimony of Charles Robert Pearson.)

those [45] percentages are percentages of the total number of ballots or pledges returned?

I think that mathematically appears to be that. It might be clarified in the record.

Trial Examiner Miller: May the stipulation be so expanded?

Mr. Weil: I am willing.

Mr. Cluck: We stipulate.

Trial Examiner Miller: Very well.

Q. (By Mr. Weil): Mr. Pearson, awhile ago we were going over the organization of the Manpower Availability Conference Committee. Was a table of organization drawn up to set forth the material that we went over, that is to say, how the committee was to function, what sub-committees were to function?

A. There was a table so drawn up for the information of the Executive Committee.

Q. Who drew that table up?

A. The committee, the MAC Committee.

Q. The committee as a whole. Showing you General Counsel's Exhibit No. 3 for identification, is that the table that you drew up?

A. Yes, it is.

Mr. Perkins: No objection.

Mr. Weil: I wish to offer General Counsel's Exhibit 3 for identification.

Trial Examiner Miller: There having been an indication [46] that there is no objection, General Counsel's 3 will be received in evidence.

(Testimony of Charles Robert Pearson.)

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.)

[See page 483.]

Q. (By Mr. Weil): Mr. Pearson, how did you happen to be appointed to the position you held in the MAC Committee, do you know?

A. Because I had been interested in it, in the Action Committee work.

Q. Who appointed you?

A. The Executive Committee approved the appointment by the chairman of the Action Committee.

Q. Did the Chairman of the Action Committee then designate to you that you were so appointed?

A. The Chairman of the Action Committee notified me by telephone that I was appointed to head up the MAC Committee.

Q. When did this take place, approximately?

A. It was either in August or September of 1952.

Q. Did you have any contact with the Executive Committee as Chairman of the MAC Committee, any direct contact?

A. We reported directly to the Executive Committee.

Q. How did you report to them?

A. By letter or memoranda.

Q. Were you responsible to the Executive Committee?

(Testimony of Charles Robert Pearson.)

A. We were responsible to the Executive Committee. [47]

Q. When your committee arrived at a plan of action or at a step in your plan of action, did you check out your individual steps with the committee or did you present them with merely an accomplished fact, the full plan?

A. I believe they were notified step by step, but not to ultimate detail.

Q. The General Counsel's Exhibit No. 3, which is the plan of organization of the Manpower Availability Conference, gives the duty of invitation subcommittee to assemble the list which we have discussed earlier, to send out the letter of invitation. Who determined when the letter of invitation should go out?

A. That would be the Executive Committee.

Q. The governing body of SPEEA. How did they let you know that you should send out the letters at a specific time? How were you informed?

A. I was advised by telephone that the Executive Committee had—that the Executive Committee instructed me to obtain the necessary licensing for SPEEA so that the invitations might be sent out.

Q. When was this?

A. In December 1952.

Trial Examiner Miller: Who so instructed you, do you know?

The Witness: I believe that was from Dan Hendricks, who at the time was a member of the Ex-

(Testimony of Charles Robert Pearson.)

ecutive Committee, and the Executive Committee's liaison officer from the MAC Committee. [48]

Q. (By Mr. Weil): The ballot which was sent out and which was reported, did you state when that was sent out? I don't believe you did. Would you state when it was sent out?

A. The ballot was sent out, I believe, in September of 1952.

Q. Can you tell me when the report was made on the results of the ballot?

A. The results of the ballot were reported to the membership the first portion of October 1952. That was in a publication authorized by the Executive Committee.

Q. (By Trial Examiner Miller): Mr. Pearson, General Counsel's 3 which gives the organization of the various sub-committees of your Manpower Availability Conference Committee bears a date in the lower right-hand corner of the first page of 10-17-52. I presume that is October 17, 1952. Is that an indication that the date on which this outline of committee organization was prepared?

A. It appears that I was in error as to the exact date. I would understand from the reference to the exhibit that the date on the exhibit is correct, that I was previously mistaken, if I said otherwise.

Q. Your recollection, then, now is that October 17, 1952, was the date on which this original scheme for the Manpower Availability Conference Committee was reduced to writing? A. Yes.

Q. If the Manpower Availability Conference

(Testimony of Charles Robert Pearson.)

Committee was thus [49] organized sometime in October, what is your recollection now as to the timing of the ballot?

A. The timing of the ballot was, to the best of my recollection, September.

Q. Before this document was prepared?

A. Yes, sir.

Q. By "this", I mean General Counsel's 3.

A. Right.

Trial Examiner Miller: Very well.

Q. (By Mr. Weil): Who was in charge of drawing up and sending out that ballot?

A. That ballot was, I believe, compiled by the Action Committee.

Q. Of which you were a member?

A. Of which I was a member.

Q. Will you explain the reason for the interval between the early part of October when the results of the ballot were published and January when the MAC was swung into action by your getting a license?

A. The Manpower Availability Conference Committee was instructed by the Executive Committee to proceed with plans but to take no overt action, or no publication, during the period which was—which was most of October 1952.

Q. Was a reason given you for those instructions or not?

A. The Executive Committee indicated that there were sub-committees [50] of the negotiating committees assigned to collect and analyze certain

(Testimony of Charles Robert Pearson.)

other data pertinent to the negotiations, and that no open action or open publication of other actions under consideration should be made.

Q. (By Trial Examiner Miller): How were you informed of this determination by the Executive Committee?

A. By an area representative news letter issued in the first week of October.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Q. (By Mr. Weil): Will you explain what an area representative is and the function?

A. The area representative, shall we say, system, is a loosely organized channel of information through individuals from the Executive Committee to the membership through an organized chain of individuals.

Q. Does the area representative system function both ways? Does it take, carry, news from the men to the committee as well as from the committee to the men?

A. The area representative news, the area representative system, is so designed.

Q. How are the area representatives selected, by whom?

A. They are appointed by a chain of authority, by the Executive Committee. [51]

Mr. Weil: Mr. Examiner, does that give you enough information? I plan to go into this more fully with another witness.

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: Very well. It is sufficient for the purpose now.

Mr. Weil: Thank you.

Q. (By Mr. Weil): Who publishes the area representative news letters?

A. At that time the area news, area representative central committee handled the function of actual compilation of the printing of the news letters.

Q. Who determined what goes into this news article?

A. At the time under discussion the Executive Committee appointed a liaison officer to monitor and approve all news letter material.

Q. After the period during which you were informed that you were not to go ahead with any overt action, what steps did the MAC Committee under your chairmanship take?

A. Actual detailed planning?

Q. Yes.

A. And the compilation of mailing lists, which has been referred to.

Q. When were you informed, or were you informed, that the moratorium was over, that you could go ahead with action?

A. We were not authorized to proceed until the latter part of December. [52]

Q. I believe you testified that at that time you went ahead with the licensing and took out your license, is that correct? A. Yes, sir.

Q. Did you draft, you, as a committee again,

(Testimony of Charles Robert Pearson.)

draft the invitation to the Manpower Availability Conference that was mailed out?

A. The drafting of the invitation was strictly a committee function.

Q. Did the committee submit that to the Executive Committee? A. Yes.

Q. The Executive Committee approved it as it stood, as submitted?

A. I do not recall whether the Executive Committee made any actual changes in the letter of invitation. See, actually this invitation had been prepared, the plans had been made to conduct the conference, in the early portion of December, then, and that action was delayed by the Executive Committee.

Q. Did the Executive Committee approve the form in which it finally went out? A. Yes.

Q. (By Trial Examiner Miller): Can you give us the timing of these various events, that is, the time at which the draft of the invitation was completed, the time in which it was submitted to the Executive Committee for consideration, and the time in which this approval was given?

A. I do not recall detail, but it is my memory that one draft [53] of the invitation was submitted to the Executive Committee concurrent with General Counsel's No. 3, which would be October 17th.

Q. I see. As you now recall it, did the Executive Committee indicate its approval of the invitation letter?

A. As text, not as—not with authority to do any releasing.

(Testimony of Charles Robert Pearson.)

Q. They approved the text sometime early in December, you said? Or did I understand you correctly?

A. They approved the release of it in the latter part of December 1952.

Q. At that time they told you to go ahead with the planning and organization of the conference?

A. A plate had actually been made of the invitation much earlier for release in November, and that was approved by the Executive Committee, and when it was held up the dates entered in the invitation had expired, and so it was necessary to do some cutting and revision to the plates before it could be released in January.

Q. I see. So that actually, if I understand you, the sense of your testimony correctly, then, the final draft of the invitation letter was actually ready at sometime in November and approved as to text by the Executive Committee, but the letter was not actually sent because there was what Mr. Weil has described as a moratorium, and if I understand the further sense of your testimony correctly, that moratorium, or suspension of action, was [54] lifted sometime late in December, at which time the text of the letter was redrafted to indicate revised dates?

A. Correct.

Trial Examiner Miller: Very well.

Q. (By Mr. Weil): Was the company informed of the intention of the SPEEA to run this conference?

Trial Examiner Miller: Mr. Weil, do you mean

(Testimony of Charles Robert Pearson.)

was the company officially informed, or are you asking the witness whether the company was aware of it?

Mr. Weil: Whether the company was officially informed by the committee.

A. The company was sufficiently informed by the Executive Committee by a letter in early January, to which a copy of the invitation was appended.

Mr. Weil: Will you mark this as General Counsel's No. 4 for identification, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Weil): Showing you General Counsel's Exhibit No. 4 for identification, is that a copy of invitation that was mailed out?

A. That is the invitation.

Mr. Weil: I would like to offer General Counsel's No. 4 for identification.

Trial Examiner Miller: Is there any objection?

Mr. Perkins: No objection.

Trial Examiner Miller: Hearing no objection, General Counsel's No. 4 will be received in evidence

(The document heretofore marked for identification as General Counsel's Exhibit No. 4, was received in evidence.)

[See page 486.]

Q. (By Mr. Weil): Mr. Pearson, did you see the letter which accompanied the invitation that went to the company?

A. No, sir. That letter was sent to the company

(Testimony of Charles Robert Pearson.)

by the Executive Committee while I was out of town on company business.

Q. Did you take actual part in the mailing out of these invitations?

A. No. The actual mailing was accomplished while I was out of the city.

Q. Did you take part in inserting the invitation in their envelopes? A. No, sir.

Q. Did you take part in addressing the envelopes? A. No, sir.

Q. Were any of these jobs done under your supervision?

A. The actual accomplishment of that mailing was under the direction of Mr. Hendricks who had my power of attorney for that purpose.

Q. Why did you find it necessary for you to give him your power of attorney? [56]

A. Because I was sent out of town on company business.

Q. When did you leave town?

A. It was either January 14 or 15.

Q. Had you at that time been instructed as to the date on which the conference was finally to have been held?

A. The date as tentatively set by the Manpower Availability Conference Committee was the date given in the invitation.

Mr. Perkins: Do you care to identify in the record at this time the letters that you are asking about, that is, the——

Mr. Weil: Did you find it?

(Testimony of Charles Robert Pearson.)

Mr. Perkins: I can get it for you right now.

Mr. Weil: I can put it in when Mr. Gardiner is on the stand.

Mr. Perkins: Is this the letter to which you have reference?

Mr. Weil: Yes.

Mr. Perkins: It is undated, but do you intend to mark that as a separate exhibit?

Mr. Weil: Yes.

Mr. Perkins: May we have it so marked so that I can refer to it?

Trial Examiner Miller: Very well.

Mr. Perkins: Then it is General Counsel's No. 5.

Mr. Weil: Yes.

Mr. Perkins: The way the record shows is that General [57] Counsel's Exhibit No. 5 for identification bears a notation on the bottom as follows: "Received 1/23/53".

Is there any contention that that date is not correct?

Mr. Weil: No.

Mr. Perkins: I make that remark because the exhibit itself is undated.

Trial Examiner Miller: Yes.

Mr. Perkins: There is no objection from the respondent as to the admission of that exhibit.

I also have photostatic copies of the exhibit if General Counsel wishes to adhere to the rule which requires two copies.

Trial Examiner Miller: Very well. Since the witness indicated that he had no personal knowledge

(Testimony of Charles Robert Pearson.)

with respect to the dispatch of the letter of notification to the company, which is the subject of General Counsel's Exhibit 5 for identification, do I take it that the exhibit is being admitted by stipulation as the letter which was sent and which was received on the date shown, on or about the date shown, in the added material at the bottom by Mr. Perkins?

Mr. Perkins: Respondent is willing to stipulate.

Mr. Weil: General Counsel is willing to stipulate.

Mr. Cluck: We so stipulate.

Trial Examiner Miller: Off the record. Off the record.

(Discussion off the record.) [58]

Trial Examiner Miller: On the record.

As a result of discussion off the record, the Trial Examiner has been supplied with conformed copies of the original letter sent, addressed to Mr. A. F. Logan by Mr. E. M. Gardiner, and on the basis of the understanding expressed on the record before our discussion off the record, I will at this time, pursuant to the stipulation, receive General Counsel's Exhibit No. 5 in evidence, the understanding being, as I view it, that the letter which is the subject of General Counsel's 5, whatever its method of dispatch and time of dispatch, was received by a representative of Boeing Airplane Company on the date and at the time shown by the notation in handwritten form at the bottom.

Mr. Perkins: And it may be further understood that a copy of General Counsel's Exhibit 4 was at that time attached to General Counsel's 5.

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: So stipulated, yes.

Mr. Weil: So stipulated.

Mr. Cluck: So stipulated.

Trial Examiner Miller: Very well, the stipulation is noted for the record and General Counsel's 5 will be received in evidence.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5 for identification, and was received in evidence.)

[See page 493.]

Q. (By Mr. Weil): Mr. Pearson, after you departed on company [59] business to the south, what was the next thing you had to do with the MAC?

A. I was advised that the invitation had been sent out in my absence, and on or about the 24th of January I received a telegram from the company instructing me to discontinue my plant visit and return to the Seattle plant.

Q. Did you so return? A. I did.

Q. What occurred on your return?

A. Upon my return to the plant I was instructed to work on my trip report for something over an hour, and at the end of this time I was escorted into Mr. Logan's office where I was held incommunicado from other members of the——

Q. (Interrupting): Who escorted you into Mr. Logan's office?

A. The escort was Mr. Woody McKissick of the personnel section of the engineering department.

Q. What happened after you entered Mr. Logan's office?

(Testimony of Charles Robert Pearson.)

Q. (By Trial Examiner Miller): Before we go any further, can we get the date of your return and the date on which you were taken to Mr. Logan's office? A. January 27, 1953.

Q. (By Mr. Weil): What happened after you went into Mr. Logan's office?

A. I was questioned——

Q. (Interrupting): Who was present? [60]

A. Present at the meeting with Mr. Logan was Mr. A. A. Soderquist, staff engineer, and myself.

Q. Did Mr. McKissick remain?

A. Mr. McKissick left.

Q. What took place at this meeting? What was said?

A. I was questioned concerning the signature on the Manpower Availability Conference invitation; and my request that other, that SPEEA representatives whether or not concerned be present was denied; upon at least two occasions my request to communicate with them by telephone was denied.

Q. (By Trial Examiner Miller): Did you name any specific persons that you wanted present?

A. I specifically named Mr. E. M. Gardiner, the Chairman of SPEEA, and Mr. Dan Hendricks, member of the SPEEA Executive Committee and the liaison officer for Manpower Availability Conference Committee.

Q. Did you specifically name any persons that you wanted to communicate with by telephone?

A. I believe the answer is no.

(Testimony of Charles Robert Pearson.)

Q. (By Mr. Weil): Do you recall anything further that took place at this meeting?

A. During the first part of the meeting I personally kept complete notes of everything that was said by myself, and as much of what was said by Mr. Logan as it was possible for me to reduce to writing, and to the best of my knowledge, Mr. Soderquist [61] contributed only minor correction to the whole proceeding in Mr. Logan's discourse that was taken down by the secretary.

Q. Do you have those notes?

A. Yes, I have the original of those notes.

Q. Where are they?

Trial Examiner Miller: The witness indicates a point in the hearing room.

The Witness: In my briefcase.

Mr. Perkins: I have a typewritten copy of what I regard as an original of those notes and I will stipulate that they may go in without objection as far as respondent is concerned.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Let the record show that during the period of discussion off the record the Trial Examiner explored with the parties the possibility of reaching an agreed understanding as to what transpired at the meeting to which the witness has been referring by reference to an agreed transcript of the conversation that then took place. The discussion off the record has indicated to me that the notes which

(Testimony of Charles Robert Pearson.)

Mr. Pearson may have and the notes which are in the company's possession may relate to different portions of the conference, and with the thought in mind that the discussion in evidence of both sets of notes will, in all probability, not involve us in conflict, but that the two notes may together provide a more accurate picture of what occurred, I am permitting the General Counsel to proceed at this time along the line indicated previously.

You may go ahead, Mr. Weil.

Mr. Weil: The notes that Mr. Pearson took I wish to use, in other words, only up to the point when the stenographer came in. From that time we are in agreement.

Trial Examiner Miller: Very well.

Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

We will have a 5-minute recess.

(Short recess.)

Trial Examiner Miller: The hearing will be in order.

Mr. Weil: Did you find from your perusal if there is anything to object to?

Mr. Perkins: May I ask some preliminary questions? Has this been marked for identification?

Mr. Weil: I will propose that it be marked for identification, but I don't propose to offer it.

Trial Examiner Miller: I am not quite sure I understand you. You propose to mark it for identification but not to offer it?

(Testimony of Charles Robert Pearson.)

Mr. Weil: I don't.

Trial Examiner Miller: I gather you merely wish to use it [63] for purposes of examination of the witness?

Mr. Weil: That is correct.

Q. (By Mr. Perkins): Referring to the booklet that you have produced here which is a writing notebook, Mr. Pearson, is that your handwriting in that book? A. Yes, sir.

Q. You had that book with you when you went to Mr. Logan's office on the occasion that you mentioned? A. That is right.

Q. And you took it with you for the purpose of making notes of the conversation that you had with him at that time? A. That is correct.

Q. And you studied these notes afterward?

A. Yes.

Q. And formed an opinion as to whether they reflect accurately the conversation that took place at this time?

A. The accuracy of those notes is limited only by my ability to write fast enough to keep up with the conversation.

Mr. Perkins: If counsel wishes to have that marked as an exhibit, respondent has no objection to its going into evidence.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Mr. Weil: Would you mark this as General Counsel's No. 6?

(Testimony of Charles Robert Pearson.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.) [64]

Trial Examiner Miller: As a result of discussion off the record, it is my understanding that the parties have reached an agreement as to the method by which our record may be made to reflect Mr. Pearson's notes with respect to the conversation which occurred in Mr. Logan's office. It is my understanding that the parties have agreed to the submission in evidence of the actual notebook in which Mr. Pearson made his notes to be marked for identification at this time as General Counsel's 6.

Mr. Perkins: Off the record.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Mr. Weil: Will you mark this as General Counsel's Exhibit No. 7?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

Trial Examiner Miller: Let the record show that during the period of discussion off the record Mr. Perkins provided Mr. Weil with a copy of the transcript made of the stenographic notes taken during the latter portion of the conference in Mr. Logan's office to which reference has already been made on our record, and that at Mr. Weil's request the reporter marked the transcript so furnished as General Counsel's 7 for identification. [65]

(Testimony of Charles Robert Pearson.)

Mr. Perkins: To which respondent has no objection.

Trial Examiner Miller: There has been no formal offer yet.

Mr. Weil: I am about to offer it.

Trial Examiner Miller: Actually, we don't have any formal offer. I have been assuming you will all along and I think our discussion on the record will show as we have been going on and off that 6 would be offered, but we don't have a formal offer of 6 and we don't have a statement on the record that 6 will be withdrawn for the purpose of making conformed copies.

Would you state your understanding with respect to General Counsel's 6 and 7?

Mr. Weil: It is the understanding of counsel that General Counsel's Exhibits 6 and 7 will be offered, will be stipulated as the transcripts of the conversation testified to by the witness. General Counsel's 6 it is stipulated will be withdrawn and copies substituted.

Trial Examiner Miller: So understood, yes.

Mr. Perkins: No. I would prefer to stipulate that General Counsel's Exhibit 6 for identification upon offer will be introduced in evidence without any objection on the part of respondent, and that General Counsel's Exhibit 7 is stipulated to be an accurate recount of the conversation that transpired in the latter part of the Logan-Pearson conference on January 27, 1953.

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: And that it may be so received. [66]

Mr. Perkins: And that it may be so received.

Trial Examiner Miller: I think that is possibly a more accurate statement.

Mr. Tillman: Further, that if the witness were to testify concerning his notes, he would testify in confirmance thereto.

Mr. Perkins: Yes, I will so stipulate.

Trial Examiner Miller: So understood, gentlemen?

Mr. Cluck: So understood.

Trial Examiner Miller: Very well, the stipulation is noted for the record.

Pursuant to the stipulation, General Counsel's Exhibits 6 and 7 for identification will be received in evidence, and permission given for the physical withdrawal of General Counsel's 6 and the substitution of conformed copies.

(The documents heretofore marked for identification as General Counsel's Exhibits Nos. 6 and 7, were received in evidence.)

[See pages 494-499.]

Mr. Weil: One more word in that connection. I would like to point out on the record that General Counsel's 6 includes only the first three pages of a bound notebook.

Trial Examiner Miller: Very well.

Q. (By Mr. Weil): After the conversation which took place then with Mr. Logan, were you

(Testimony of Charles Robert Pearson.)

dismissed in accordance with the words in that conversation?

A. Mr. Logan's concluding statement was that I was dismissed as of that time. [67]

Q. Were you subsequently given a dismissal notice and actually taken off the payroll?

A. Yes.

Q. By "dismissed", I mean dismissed from the employ of the company. Does your answer still stand? A. Yes, sir.

Mr. Perkins: The answer admits discharge.

Mr. Weil: Would you mark this as General Counsel's Exhibit 8, please, for identification?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

Q. (By Mr. Weil): When you were dismissed from the employ of the company were you given a dismissal notice? A. Yes, sir.

Q. Handing you General Counsel's 8 for identification, is that a photostat of the original dismissal notice that you were given?

A. Yes, sir, that is the photostat of the dismissal.

Mr. Weil: Will counsel stipulate that this photostat is a true copy of the original?

Mr. Perkins: Yes.

Mr. Weil: I would like to offer General Counsel's Exhibit 8 for identification.

Mr. Perkins: No objection.

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: General Counsel's Exhibit 8 will be received in evidence. [68]

(The document heretofore marked General Counsel's Exhibit No. 8 for identification, was received in evidence.)

[See page 499.]

Q. (By Mr. Weil): After you left this meeting, Mr. Pearson, what did you do?

A. At the end of the meeting I was permitted to contact Mr. Gardiner and Mr. Hendricks by telephone while Mr. Logan's secretary was transcribing her notes of the latter portion of the conversation. In those conversations arrangements were made that I would meet with the Executive Committee after leaving the premises of the company.

Q. Did you attend any conference with the Executive Committee about your discharge?

A. The same afternoon, yes, sir.

Q. Did you attend any further conferences of the Executive Committee, or meetings of the Executive Committee regarding your discharge?

A. Yes.

Q. When?

A. You mean subsequent to January 27th?

Q. Subsequent to your discharge.

Mr. Perkins: I am not quite clear. Are these company meetings that you are referring to or are these intra-union meetings? You are not talking about meetings between company and SPEEA?

Mr. Weil: I am talking about meetings within the union.

(Testimony of Charles Robert Pearson.)

The Witness: There was such a meeting on the afternoon of [69] January 27th at which I was in attendance.

Q. (By Mr. Weil): Were there any other meetings at which you were in attendance thereafter?

A. Yes.

Q. When?

A. Executive Committee meetings of the next two or three weeks.

Q. Did you attend all of the Executive Committee meetings thereafter or several such meetings? A. I believe so.

Q. You believe you attended all or do you believe you attended several?

A. Several. Excuse me.

Q. To your knowledge, did the Executive Committee take any action resulting from your discharge?

A. The Executive Committee drafted a letter to the company requesting that the matter be negotiated.

Q. Was the matter negotiated?

A. Meetings were held with the company, yes.

Q. Did you attend those meetings?

A. I attended one of those meetings which was not an official negotiating meeting, as near as I can determine, but the actual negotiations did not include—I was not present. Excuse me.

Mr. Weil: Mr. Examiner, I won't go into the matter of these meetings with this witness any

(Testimony of Charles Robert Pearson.)

further, because I shall put that on with other witnesses. [70]

Trial Examiner Miller: Very well.

Q. (By Mr. Weil): Did you subsequently receive a letter from the company reviewing your discharge or your termination?

A. Yes, sir.

Q. Can you tell me when that was received?

A. I believe it was the early part of March 1953.

Mr. Weil: Will you mark this, please, as General Counsel's Exhibit No. 9?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Mr. Perkins: No objection.

Q. (By Mr. Weil): Showing you General Counsel's Exhibit No. 9 for identification, is that the letter you received? A. Yes.

Mr. Weil: I would like to offer General Counsel's Exhibit No. 9 for identification.

Trial Examiner Miller: Is there any objection?

Mr. Perkins: No objection.

Trial Examiner Miller: General Counsel's Exhibit No. 9 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 9 for identification, was received in evidence.)

[See page 500.]

Q. (By Mr. Weil): Does the date on General

(Testimony of Charles Robert Pearson.)

Counsel's No. 9 refresh your memory about when you received it? [71] A. Yes.

Q. Did you receive that letter on or about the date that is written on that letter?

A. I believe that was within a day or so after the date of that letter, yes.

Q. Were you subsequently re-employed by the company, by the respondent?

A. Yes, on or about March 17.

Q. What did you do in the meantime in that period between your discharge and your re-employment?

A. For that period I was working for the Seattle Professional Engineering Employees Association on their office staff.

Q. Are you presently working for the respondent? A. Yes.

Q. On your reinstatement or re-employment by the company, were you reinstated completely to the position you held when you were discharged?

A. I was re-employed in the same crew, yes, sir.

Q. Were you re-employed, were you reinstated in the rights which may have occurred to you as a result of the seniority you had built up there, to your knowledge?

A. That has been rather difficult to determine, but it appears that the answer would now be yes.

Mr. Weil: That is all.

Trial Examiner Miller: Mr. Cluck? [72]

Mr. Cluck: Not at this time.

Trial Examiner Miller: Mr. Perkins?

(Testimony of Charles Robert Pearson.)

Mr. Perkins: Thank you, yes.

Cross Examination

Q. (By Mr. Holman): Mr. Pearson, when did you first go to work for Boeing?

A. September 1940.

Q. September 1940. And calling your attention to the fall of 1951, in what capacity did you work for Boeing?

A. In the fall of 1951 I was transferred, or in the late summer, to the pneumatics group, on the B-52. My position——

Q. (Interrupting) I don't think I understood the last statement.

A. My position has been that of engineering designer since, I believe, the spring of 1952.

Q. When did you first join SPEEA?

A. In the spring of 1951.

Q. Spring of 1951. How long had SPEEA been operating at that time, if you know, at the Boeing plant?

A. Since around 1945 or so. I am not sure.

Q. What offices have you held in SPEEA during the year of 1951? What offices did you hold, if any? A. None in 1951.

Q. Were you active on any committees in 1951? That is committees of SPEEA I am referring to.

A. I was active on an insurance committee for a short time but I do not recall the date.

Q. When did you first become active on the

(Testimony of Charles Robert Pearson.)

Action Committee to which reference was made in your direct examination?

A. In the summer of 1952.

Q. The summer of 1952. How long had the Action Committee been going on at that time?

A. To the best of my recollection, since the fall of 1951.

Q. Who was the head of the Action Committee in the fall of 1951?

A. I believe that would be James B. Williams.

Q. James B. Williams. Now, the Action Committee was formed, was it, to consider various types of non-strike action? A. Yes.

Q. And the Manpower Availability Conference was one of those types of actions?

A. (Witness nods.)

Trial Examiner Miller: Let the record show the witness nodded his head in the affirmative.

Q. (By Mr. Holman): You were familiar with the purpose and the activities of the Action Committee during the fall of 1951? That is, as a member of SPEEA?

A. I was present at a general membership meeting at which the Action Committee made a report.

Q. You spoke of a report that had been prepared at the end of 1951. Is that correct? A report with respect to possible [74] action that could be taken?

A. Yes. This was at the close of the negotiations, approximately near the time that the vote was taken on an earlier contract.

(Testimony of Charles Robert Pearson.)

Q. That report indicated certain types of actions short of a strike that could be taken, is that correct? A. Yes, sir.

Q. And the Manpower Availability Conference is one of those types of action?

A. Yes, sir.

Q. And other types of action were refusal to punch time clocks?

A. I do not recall whether that was in that particular report or not.

Q. Was that a form of action which was later considered by the Action Committee?

A. It was discussed in the Action Committee as a possible action.

Q. You mentioned other forms of action short of a strike, other than the Manpower Availability Conference. What forms did those suggested lines of action take other than the MAC?

Trial Examiner Miller: Are you speaking now about the fall of 1951, the earlier report to which the witness previously referred?

Mr. Holman: Yes, that is correct. [75]

Trial Examiner Miller: Very well.

A. My memory isn't good enough to remember the details of that report even to the extent of the suggestion—failure to punch time clocks. I don't recall.

Q. (By Mr. Holman): I don't expect you, Mr. Pearson, to remember all the details. I am just trying to inquire as to what other non-strike actions

(Testimony of Charles Robert Pearson.)

were contemplated as you testified in direct examination other than the MAC?

A. Are you speaking of 1951 or '52?

Q. You don't recall any, 1951?

A. I was not in the Action Committee at that time.

Q. I understand that, but do you recall any? If you don't recall, that is all I am asking.

A. Not well enough to give any——

Q. (Interrupting) How about in 1952, then?

A. There is in existence a fairly complete report of what the Action Committee reported to the general membership.

Q. When was that made up, more or less?

A. In the summer of 1952.

Q. Could it have been around August?

A. I think that that would be about right.

Q. I am holding in my hand what has been entitled "Proposal for SPEEA'S plan of action", which appears to be signed by the Action Committee. Is this the report to which you make reference? [76] A. Yes.

Q. Calling your attention to the last page on this report, in item 3 it indicates that one of the actions is to stop punching time clocks.

A. Yes.

Q. What other actions were considered besides stop punching time clocks by the Action Committee in the MAC?

A. Would you care for me to read from that report?

(Testimony of Charles Robert Pearson.)

Q. Well, the General Counsel can put the report in if he wishes. I am asking for your recollection at the moment.

Mr. Tillman: I would like to interpose an objection as to materiality to any further types of action that this Action Committee may have engaged in.

Trial Examiner Miller: What is the materiality, Mr. Holman?

Mr. Holman: The materiality of this is that the type of action which the SPEEA engaged in is similar and has been allied to the type of action which the Manpower Availability Conference is presently involved in. This goes to the question as to whether the SPEEA was bargaining in good faith, which is part of the contention in the complaint, good faith being that they were on the Boeing payroll and nevertheless were taking action against the Boeing management, such as the Manpower Availability Conference.

Mr. Perkins: It is also part of the background, Mr. Examiner, [77] against which the employer here appraised and viewed the Manpower Availability Conference.

Mr. Holman: I might also point out, Mr. Examiner, this was brought out on direct examination. The witness stated that this was one of a number of lines of attack that they had considered. I think we are entitled to show that since it has been opened up under direct examination.

Mr. Tillman: I don't consider that as opening up. I would say one of several considered.

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: If the matter has that relevancy and materiality, I will sustain the objection. I am considering whether or not it has relevancy and materiality on the two grounds indicated by counsel for the respondent company. Since there is no cross-complaint, as it were, in this proceeding against SPEEA on the grounds of refusal to bargain under Section 8 (b) (3), there is no specific issue posed in that connection except insofar as it is posed under the doctrine of the St. Petersburg Times' case.

Mr. Perkins: How does the Examiner regard our further defense in that respect?

Trial Examiner Miller: I would take the position as a matter of law that the allegation in an answer that a union had refused to bargain in violation of Section 8 (b) (3) poses no issue for the Board's determination under Section 8 (b) (3). In other words, the mere fact that the question of the union's [78] bargaining in good faith has been injected into the case does not in and of itself raise an issue requiring an affirmative order by the Board if it were to find in line with the allegation in the answer under Section 8 (b) (3) calling upon the union to bargain. If the matter is material at all, it is material as a defense independently of the provisions of Section 8 (b) (3), and as a defense independently of the provisions of 8 (b) (3) the defense is of relevance in the case only if the doctrine of the St. Petersburg Times case is involved, that doctrine being a doctrine which holds, in effect,

(Testimony of Charles Robert Pearson.)

that a company cannot be found to have engaged in unfair labor practice of refusing to bargain if the conduct of the union in the course of the negotiations was such as to create a situation in which the company's good faith could not be tested.

I confess that I have some idea in seeing a parallel between the situation in the St. Petersburg Times case and in this case. Insofar as these other suggested lines of action by SPEEA short of strike are involved, I am not satisfied that this particular line is material on that theory insofar as an examination along this particular line may serve to elicit background material which the company alleges to be relevant in determining the manner in which it appraised the situation with which it was confronted when MAC swung into action. I confess that I am not as clear in my own mind as to its materiality and for that reason I am going to overrule the objection. [79]

Mr. Cluck: If Your Honor please, I want to call attention to the wording in the defense here, that is, in the answer, in which it is stated, "For the further grounds of defense, respondent charges that SPEEA through its officers and agents, has refused to bargain collectively in good faith with respondent, in violation of Section 8 (b) (3) in the Act, to the extent that SPEEA organized, promoted and operated the Manpower Availability Conference, to which reference is made in the complaint, and conducted activities relating to such Manpower Availability Conference, the threat of economic ac-

(Testimony of Charles Robert Pearson.)

tion against and damage to respondent, in pressing the demands of SPEEA in the collective bargaining negotiations between the parties."

So, by its language the defense relates only to assertion of bad faith relating to MAC, and on that ground this other is irrelevant.

Trial Examiner Miller: The point is well taken.

I have already ruled that the grounds cited by Mr. Holman would not be grounds sufficient to convince me of the materiality in this particular issue, but with respect to the ground adduced by Mr. Perkins, I am not quite as clear, and in the interest of developing the complete record I am going to overrule the objection.

Q. (By Mr. Holman): Mr. Pearson, calling your attention to item one under "Plan of Action", what purports to be the proposal for SPEEA's plan of action referred to earlier, item one states [80] "neutralizing the hire campaign". Is that correct? A. That is correct.

Q. What was meant by that? What form of action was meant by that?

A. That would be primarily a campaign of publicity.

Q. What form of publicity?

A. All forms.

Q. Directed to what?

A. To the public, including engineers that Boeing might like to hire, students in colleges.

Q. In other words, to neutralize the effect of advertisements to graduates of colleges?

(Testimony of Charles Robert Pearson.)

A. The effect of Boeing's advertisement for additional personnel, yes, sir.

Q. In other words, to discourage the people from coming to work for Boeing?

A. To advise them of the situation as we saw it.

Q. Which was not to come to work for Boeing, is that correct? A. Sure.

Q. Calling your attention to the MAC, you have stated that you were the licensed agent and you were required to go before the City Council, is that correct?

A. I did appear before the council to obtain a license as an agent of SPEEA.

Q. What did you tell the City Council? [81]

A. I made a standard application for a business license.

Q. For what purpose?

A. An employment agency.

Q. You say you stated that as a SPEEA representative?

A. The license was applied for in the name of Charles Robert Pearson, doing business as a SPEEA officer, in short.

Q. Did you advise them as to the purpose of getting the license? In other words, what action you were going to take?

A. I don't get the significance of the question.

Q. That may come later. I am only asking you if you ever advised the City Council as to the reason why you wanted to be licensed. Let me ask you this:

(Testimony of Charles Robert Pearson.)

Did you advise them that you were going to hold this Manpower Availability Conference?

A. We just applied for an employment agency license.

Q. I am asking you whether you indicated to them that it was being used for this Manpower Availability Conference?

A. To the extent that the title named in the application was made and the license was issued implied——

Q. (Interrupting): You didn't mention Manpower Availability Conference to them, is that correct?

A. The license was applied for and granted in the name of Charles Robert Pearson, doing business as Manpower Availability Director of SPEEA.

Q. That is that title in which it was applied for, is that correct? [82] A. Yes, sir.

Q. You spoke of a Facilities Committee. That was designed to line up a meeting place and other facilities to hold this conference?

A. Yes, sir.

Q. Who was approached, that is, what facilities were approached with a view toward being used in this conference?

A. I don't have that information. That was a sub-committee assignment.

Q. Weren't they under your direction?

A. Sure.

Q. Didn't they report to you?

(Testimony of Charles Robert Pearson.)

A. In detail as to whom they contacted for space and facilities, no.

Q. Do you know whether they did or not?

A. They informally reported some possible facilities that they could get, what the range of prices would be on those facilities, yes.

Q. So they contacted facilities to get the range of prices, is that correct? A. Certainly.

Q. You don't know what facilities were contacted in that regard? A. No.

Q. You don't remember any of them? [83]

A. No.

Q. In connection with the Mailing Committee, they prepared a list of the firms to which the invitation for the Manpower Availability Conference would be sent, is that correct?

A. Except for the designation of that sub-committee.

Q. Perhaps——

A. (Interrupting) In our organization another title is indicated.

Q. The Invitation Committee?

A. Yes, sir.

Q. The firms to which this invitation was sent were located all over the country?

A. Yes, sir.

Q. All over the United States? A. Yes.

Q. And they were firms that you had reason to believe would like to employ engineers?

A. Yes, sir.

(Testimony of Charles Robert Pearson.)

Q. They were of all different types of industries? A. Yes, sir.

Q. They were requested to come to interview the engineers who were in Seattle, is that correct?

A. They were invited to attend a conference in Seattle.

Q. And to talk with engineers from SPEEA, is that correct?

Mr. Weil: I would like to object to that. The invitation [84] is in evidence. It is the best evidence.

Mr. Holman: We will withdraw it.

Trial Examiner Miller: Very well.

Q. (By Mr. Holman): Calling your attention to the Manpower Availability Conference ballot, Mr. Pearson, those were sent to the SPEEA members? A. Yes.

Q. And just to SPEEA members?

A. I believe that is correct.

Q. Approximately how many members were there in SPEEA at that time, if you remember?

A. Well, I prefer not to try to recall, the matter of recollecting a figure that——

Q. (Interrupting) What would be your best estimate? A. Roughly, 2000.

Q. Calling your attention to your meeting with Mr. Logan at the time you were terminated from the company, you and Mr. Logan were present, along with Mr. Soderquist and a secretary, is that correct?

(Testimony of Charles Robert Pearson.)

A. A secretary during the latter part of the meeting.

Q. Were you informed at any time that you could not leave the office?

A. I don't recall that I asked to leave the conference. I did ask that other members of the Executive Committee be present. I did ask for permission to contact them by telephone. The [85] telephone request is not included in the transcript of the meeting.

Q. You testified you were held incommunicado. You aren't indicating to the Examiner here, are you, that you could not leave the room any time you wanted to?

A. I think it was made pretty clear by inference, "Here is the meeting place. Sit down." I was very forcefully invited to sit down and listen.

Q. You didn't ask to leave?

A. I asked to use a telephone and I asked the other people be present.

Q. You didn't ask to leave, is that correct?

A. I do not recall, no.

Q. After the meeting was over you were permitted to use the telephone, is that correct?

A. Yes.

Q. And did use the telephone? A. Yes.

Q. About how many invitations to the Manpower Availability Conference were sent out?

A. Over 2800.

Q. About 2800? A. Yes.

Mr. Holman: That is all we have.

Trial Examiner Miller: Mr. Weil, any redirect?

Mr. Weil: I don't have any.

Trial Examiner Miller: Mr. Cluck?

Mr. Cluck: None.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Trial Examiner Miller: At this time we will recess for 5 minutes.

(Short recess.)

Trial Examiner Miller: The hearing will be in order.

Let the record show that during the period of recess the counsel for respondent company indicated a desire to recall Mr. Pearson for certain additional questions.

Would you take the stand again for a moment, Mr. Pearson?

CHARLES ROBERT PEARSON

having been previously duly sworn, resumed the stand and testified further as follows:

Further Cross Examination

Q. (By Mr. Perkins): Mr. Pearson, this is probably an obvious question but I want to be sure on the record. Handing to you what has been admitted as General Counsel's No. 4, which is the letter on the SPEEA letterhead entitled "Are you in need of additional engineers", will you look at the second page and tell us what—whether that is a facsimile of your signature?

A. Yes, that is a facsimile of my signature.

(Testimony of Charles Robert Pearson.)

Q. And that signature was signed on over 2800 letters that were sent by SPEEA throughout the country? [87] A. Yes, sir.

Q. Was there any particular geographical location of the firms that were the addresses on that mailing list, or were those firms located throughout the various sections of the United States?

A. They were located throughout the United States.

Q. After your discharge by the Boeing Airplane Company, you said that you were employed during the entire time by SPEEA, is that correct?

A. On its office staff.

Q. Did you follow the activities of SPEEA very closely as to the Manpower Availability Conference after your discharge? A. Surely.

Q. And you are acquainted with the occurrences in connection with that Manpower Availability Conference? A. Such as what?

Q. Do you know what happened with respect to the Manpower Availability Conference after your discharge from the respondent company?

A. Surely.

Q. How did your information in that respect come to you? Were you actively participating in the activities of the Manpower Availability Conference?

A. I continued to be a chairman of the MAC.

Q. Did your discharge from Boeing Airplane Company in truth [88] interfere with your activities in connection with the Manpower Availability Conference in any way?

(Testimony of Charles Robert Pearson.)

A. It put me under considerable emotional strain which colored every activity.

Q. Was there any retraction of the letter that was sent out by SPEEA which is General Counsel's Exhibit No. 4, which is the letter bearing the facsimile of your signature?

A. You mean was that invitation withdrawn?

Q. Yes.

A. Individual companies who responded to this invitation were advised by letter that the conference would not be held.

Q. What was the reason for those companies being so advised, Mr. Pearson?

A. That the response was too small to make it worthwhile.

Q. What was the response to those letters?

A. The total replies received were approximately a dozen and a half.

Q. It was decided upon the receipt of that number of letters that you would not proceed further with your plans for the Manpower Availability Conference?

A. This invitation gave a deadline and after the expiration of that deadline it was obvious that the response was too small to permit continuation of these plans.

Q. What was your personal program in connection with the Manpower Availability Conference after your discharge by the [89] respondent company? What was it proposed that you do in connection with the Manpower Availability Conference

(Testimony of Charles Robert Pearson.)

after the date of your discharge? What were SPEEA's plans in that respect, and what were your plans in that respect?

A. To carry through the Manpower Availability Conference.

Q. Did you do that to the best of your ability?

A. I believe so.

Q. As to the 15 responses that you received, responses to the letter which is in evidence as General Counsel's Exhibit 4, can you tell us in a general way as to the nature of those replies, were they acceptances, were they letters in which the addresses involved declined, or what was the general nature of those responses to your letter? Can they be summarized?

A. Some of the replies expressed interest, some of the replies which were received subsequent to the deadline stated that they would like to attend, and others indicated that the distance was too great, or that their needs were not serious enough to warrant their participation.

Q. Do you attribute the results of the Manpower Availability Conference in any way to your discharge by the Boeing Airplane Company?

A. Will you please repeat that?

(Question read.)

A. I have no evidence that responding companies were advised as to that discharge.

Mr. Perkins: No further questions. [90]

Trial Examiner Miller: Mr. Weil?

Mr. Weil: I have nothing further.

(Testimony of Charles Robert Pearson.)

Trial Examiner Miller: Mr. Cluck?

Mr. Cluck: No, sir.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Mr. Weil: I would like to call Mr. Gardiner at this time.

EDWARD McELROY GARDINER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Would you give us your name and address, Mr. Gardiner?

A. Edward McElroy Gardiner, Norwood Village, Bellevue, Washington.

Q. What is your occupation, Mr. Gardiner?

A. Research engineer, Boeing Airplane Company?

Q. How long have you been employed by Boeing Airplane Company?

A. About seven years.

Q. Are you a member of SPEEA?

A. Yes.

Q. How long have you been a member?

A. My recollection is 1949.

Q. Have you ever held any office in SPEEA?

A. Yes. [91]

Q. What offices?

A. I have served on minor committees at the

(Testimony of Edward McElroy Gardiner.)

start for study purposes of questions, and I have served on the Executive Committee.

Q. When did you become a member of the Executive Committee?

A. Well, it was, I would say, between November of 1950 and January of 1951. It is right in that period. I filled in an unfinished term of another member.

Q. Can you tell us what the function of the Executive Committee is?

A. The Executive Committee has the authority and responsibility for the business of the SPEEA organization.

Q. What is the function of the Chairman of the Executive Committee?

A. The Chairman of the Executive Committee is selected by the members of the Executive Committee and serves as the chairman for the regular membership meetings, acting, and chairman for the Executive Committee and spokesman for the SPEEA organization.

Q. As such spokesman, does the Chairman of the Executive Committee speak for the organization in bargaining meetings with Boeing Airplane Company and other companies?

A. In bargaining meetings he speaks as a member of the Negotiating Committee. This committee is selected by the Executive Committee and during the last sessions has been the Executive Committee.

Q. With no additions, I take it?

A. None that I can recall.

(Testimony of Edward McElroy Gardiner.)

Q. By "last sessions", do you mean—what do you mean?

A. I am sorry. The 1952-1953 negotiation period and the 1951 negotiation period.

Q. We discussed earlier with Mr. Pearson the question of area representatives. Can you tell me how they are selected?

A. Yes. An area representative system was organized by the Executive Committee in response to a request from the membership. The top central committee heads were appointed following there—I am searching for the term here—they apply for membership, and after such application their appointment was accepted. The Central Committee then requested applications from other interested members located geographically throughout the unit. This is the bargaining unit. It was expected that the membership would choose their own area representatives after this first interim period had been completed. This was to be done by election. But in the interest of getting the whole affair started, the selection of the area representatives was accomplished by appointment.

Q. How are these committee members selected?

A. By secret ballot of the entire membership.

Q. How is that ballot conducted?

A. It is conducted annually for three of the six members of the Executive Committee. Nominations are accepted at the meeting [93] preceding the annual meeting held in March, and the election is held by secret written ballot, mail ballot in the in-

(Testimony of Edward McElroy Gardiner.)

terim. Also, if any member of the Executive Committee vacates his office for any reason, the mail ballot is held shortly afterwards and a new member is elected.

Q. What is the term of the member?

A. Two years.

Q. How is the chairman selected?

A. By election held by the Executive Committee in executive session.

Q. Are you familiar with the plan of action known as the Manpower Availability Conference?

A. Yes.

Q. Was this plan ever submitted to the Executive Committee during your term of office?

A. Yes.

Q. When was it first submitted?

A. The first submission was an informal submission made, I believe, in August of 1952. If we were referring to the submission made by the Action Committee during that last period—or do you wish to refer to the one preceding that?

Q. Was there one preceding that?

A. The first submission was made during the closing days of the negotiations on the 1951 contract in which an Action Committee was formed, headed by Gene B. Williams, in which actions [94] were proposed. The second submission of an Action Committee report was made at a meeting of area representatives in an informal manner, I believe, about a week before the August meeting, 1952.

(Testimony of Edward McElroy Gardiner.)

Q. By "August meeting", you mean that August membership meeting or——

A. (Interrupting) August general membership meeting.

Q. Is there any particular day on which general membership meetings are held?

A. It has been customary to hold them on the first Monday of each month, but that date was set back last fall to the second Monday due to difficulties in obtaining the proper meeting hall.

Q. That is, the submission, the informal submission, to the Executive Committee was made in the week prior to the first Monday in August?

A. Yes, if my memory serves on that. I have records that I can refer to, if you wish.

Q. I think that is probably close enough. Who submitted it to the Executive Committee?

A. The submission, it was made at the area representative meeting, was made by Dan Hendricks, speaking for William Bryant who was then the head of the Action Committee. This particular plan was informally discussed by area representatives and the Executive Committee in which certain dissatisfactions were discussed. [95]

Q. Would you carry on in narrative form the course that——

A. (Interrupting) Yes. Following that period no action was taken by the Executive Committee until the general membership meeting held in August, in which case the representative of the Action Committee read the proposed format—no, proposed

(Testimony of Edward McElroy Gardiner.)

Action Committee report for general membership acceptance.

Q. (By Trial Examiner Miller): Who was it that actually read it?

A. I can't recall, Mr. Examiner. I am not sure whether it was Mr. Hendricks or Mr. Bryant.

Trial Examiner Miller: Very well, proceed.

A. (Continuing) I could obtain that from the record.

The membership then expressed their approval of the Action Committee report and directed the Executive Committee to publish the report to the membership.

Mr. Perkins: Just a minute. May I raise a point there?

He said that the membership accepted or approved. In a sense there are several objections that could be made as to the best evidence, and so forth, but I would prefer not to object if we can have testimony at this point as to the number present and the number of votes.

The Witness: This is a matter of record. Would you like to declare a recess?

Trial Examiner Miller: We will recess for a sufficient period of time to permit consultation of the records. [96]

(Short recess.)

Trial Examiner Miller: The hearing will be in order.

The Witness: There were 182 members present

(Testimony of Edward McElroy Gardiner.)

and the minutes indicate only that a majority accepted the recommendations.

Q. (By Trial Examiner Miller): By formal vote?

A. Yes. This is all done by a standard vote, not a secret ballot.

Q. (By Mr. Holman): What date was that again? A. August 4, 1952.

Trial Examiner Miller: Continue, Mr. Weil.

Q. (By Mr. Weil): What was the purpose in the vote of the membership directing that the plan be published and submitted to the membership?

A. The reason for that, if I may explain the answer, is due to the fact that SPEEA is a democratic organization, and as such is made up of quite a few different types of individuals representing different backgrounds. As a result, the Executive Committee has been continually dealing with those who wish immediate, and you might call it pressure action, to be taken against the company in pursuance of a contract, and those who believe that the whole affair of negotiations could be more properly carried out by continued negotiation on a rational basis. As a result of that, the views that were expressed by the membership that it was wise to publish data concerning a possible plan of action which could be carried out by the membership at a later date should rational [97] bargaining fail, and should such pressure actions be necessary. In other words, the membership were rather unacquainted with what could be done and had requested that

(Testimony of Edward McElroy Gardiner.)

the Action Committee be organized, and that its contents distributed, its report distributed, in order that they could understand what it might be possible for them to do.

Q. Did the Executive Committee then cause the report to be published and distributed to the membership? A. Yes, sir.

Q. When did that take place?

A. I believe that took place the following week. It was in that order of time scale.

Q. Did the report that was published and sent out provide for a balloting of the members, how they felt about it, or was it simply an information release to them?

A. I don't recall whether the ballot and the report were concurrent, or whether there was a time lapse between the two. I would have to check the record again in order to ascertain that.

Q. Is that the ballot which we have in evidence as General Counsel's Exhibit No. 2?

A. That is right.

Q. (By Trial Examiner Miller): In other words, the ballot which is in evidence as General Counsel's No. 2 is one which may have gone out with the published report or may have gone out a little bit later?

A. That is right. I could check from the records on that.

Q. (By Mr. Weil): I believe General Counsel's Exhibit No. 2—I will show you that exhibit. Is that the report to which you are referring?

A. Yes.

No. 14540

United States
Court of Appeals
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Petition for Review and Petition to Enforce Order of the National Labor Relations Board

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(Testimony of Edward McElroy Gardiner.)

Q. Is this the report?

A. I believe that is.

Q. Following that ballot what further action did the Executive Committee take in regard to the MAC?

Mr. Perkins: Just to clarify the records, is this the ballot that we are talking about now with respect to which certain results were testified to earlier as to number of votes and percentage of votes?

Trial Examiner Miller: I so understood by the reference of General Counsel.

Mr. Perkins: I just wanted to tie this part of the record to that part of the record.

Q. (By Mr. Weil): Mr. Gardiner, will you answer my question? Can you recall it?

A. I would prefer to have it repeated just to make sure.

Q. To save going back, I will rephrase it. Did the Executive Committee take any further action regarding MAC after the ballot was submitted and the returns came in? A. Yes.

Q. What was the form of that action? [99]

A. The Executive Committee considered the ballot as a true ballot of the membership and, therefore, requested that the Action Committee carry out a further study and make reports to them, make reports to the Executive Committee, concerning a finalization of plans for such action, and also advise that, due to the nature of the negotiations at that particular time, to take no overt action which would in any way cause harm to these negotiations to SPEEA or to the Boeing Airplane Company. At the same time the Executive Committee re-

(Testimony of Edward McElroy Gardiner.)

quested a negotiating meeting with the Industrial Relations Division of Boeing Airplane Company and advised them at that particular meeting of the results of the MAC poll. And at that particular meeting the Negotiating Committee expressed its concern over the results of this poll, in view of its seriousness, both to SPEEA and to the company, and told them, told the company in this particular case that whereas we felt at that particular time that the company and SPEEA were negotiating in good faith in their efforts to reach a mutual understanding, that the Executive Committee was acting under its authority to take no action on this particular conference for four weeks.

Q. (By Mr. Perkins): By that you meant the Manpower Availability Conference?

A. Yes.

Q. (By Mr. Weil): Is this the four weeks moratorium?

A. Yes. The statement was not made that it would be only four [100] weeks, the statement was made that it would be at least four weeks.

Q. Could you tell me preliminarily does membership vary greatly from month to month in SPEEA?

A. Yes. There is an annual trend which tends to increase to a maximum somewhat prior to the signing of a contract and final determination of a contract. In addition, the membership of SPEEA has been continually expanding during the last few years.

Q. As a member of the Executive Committee, as

(Testimony of Edward McElroy Gardiner.)

the Chairman of the Executive Committee, is the knowledge of the membership figures one of your functions?

A. No. We do have access to the data and I believe in this particular case it might be wise to state that at the time the MAC poll was held, I believe the membership to be on the order of thirteen to fourteen hundred rather than the figure previously mentioned. However, this is a matter of record and could be checked. Its only purpose is to indicate the percentage of the entire membership and the percentage of the group we represent in considering the importance of the ballot held on the MAC.

Q. Does SPEEA represent employees of any other company other than Boeing?

A. Yes. Continental Can Corporation Division located in Seattle.

Q. Has SPEEA represented employees of any other companies other than Boeing and Continental Can in the past?

A. Yes. We do not now act under any contract, however, and [101] have not for the last several years with any of the other companies, G. E., X-ray, and once again, if my memory serves me, Issacson Steel—it doesn't sound quite right to me. I would have to check on that.

Q. Was the Manpower Availability Conference designed to include only those members of SPEEA who worked for Boeing?

A. The Manpower Availability Conference in

(Testimony of Edward McElroy Gardiner.)
the opinion of the Executive Committee had three or four purposes.

Q. What were those purposes?

A. We felt it imperative that data be available to ourselves and to the company as to the degree of difference between the rate for engineers to be given at experienced level and the rates now paid by Boeing, or at that particular time paid by Boeing. Inasmuch as negotiations between engineers and employers at the time of hiring is an individual affair, both we and Boeing had found difficulty in getting together as to the degree of this difference between going rates and Boeing rates. It was felt that a——

Mr. Perkins (interrupting): I beg your pardon. Are we getting into this area that we discussed earlier in this proceeding as to the respective objective merits of the offers of both parties and the monetary positions taken respectively by the parties in negotiating? If so, I would like to——

Trial Examiner Miller (interrupting). I wouldn't so interpret the testimony. I assumed that Mr. Gardiner is now giving us [102] his recapitulation of the thinking of the Executive Committee as to the purpose and need for the Manpower Availability Conference as a pressure tactic.

Mr. Perkins: I will withdraw my objection.

A. (Continuing) Recapitulating my discussion up to that point, the first was to obtain data concerning the market value of engineers for bargaining purposes. Secondarily, the purpose is to provide needed employment opportunities for those

(Testimony of Edward McElroy Gardiner.)

engineers who had indicated to us their strong desire to leave the company, no matter what occurred. In other words, to that extent we found that SPEEA could be of service to engineers whether within the framework of negotiation or during periods outside of that. Thirdly, we felt that the actions taken through the MAC would serve to eliminate the situation of the engineers at Boeing and the conditions that we felt were important, this elimination to occur throughout the country. This third purpose was to serve as a form of pressure on the company.

Q. (By Mr. Weil): To get back to my prior question, which I think you have partially answered, was the conference designed to aid engineers, or designed to interview engineers other than members of SPEEA, other than employees of Boeing Airplane Corporation?

A. In its expanded version it could. However, in this particular case we limited participation in the Manpower Availability Conference as intended only to members of Boeing, the reason [103] being that it was not clear in our mind yet whether the activities of the Manpower Availability Conference were in strict accordance with the contract which we had at that time with Continental Can, they being the other members of SPEEA, and it was felt wise and prudent for us not to allow them to be included until we were sure of that particular point. At that time we had no contract with Boeing Airplane Company but did with Continental Can.

Q. Can you tell us to what extent the Executive

(Testimony of Edward McElroy Gardiner.)
Committee actually controlled the working out of the plan for the MAC?

A. Well, it would depend upon the version of the—the Action Committee would say it is complete control, and the Executive Committee would say that it is merely a restraining control. But in this particular case, the activities considered were conceived and built up by the members of the Action Committee. They in turn reported to a liaison officer of the Executive Committee. And perhaps this wouldn't be a digression to say that in the Executive Committee all standing committees report to at least one of the Executive Committee. We call that particular member the liaison officer. And, therefore, monitoring an approval of actions to be taken of each committee rests with the Executive Committee.

Q. As Chairman of the Executive Committee, you have already indicated as Chairman you were a member of the bargaining team. As Chairman also was it your duty to initiate the bargaining [104] with the respondent? In other words, to open the contract?

A. We had that opportunity and we took advantage of it. That is the—say that either member can at the prescribed time request continuation of the contract or——

Q. (By Mr. Tillman—interrupting): By "member" you mean party?

A. Yes, either Boeing Airplane Company or SPEEA. And this initiation was made by SPEEA

(Testimony of Edward McElroy Gardiner.)

at the start of the last negotiations on April 2, 1952.

Mr. Weil: May we go off the record?

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Q. (By Mr. Weil): I believe, Mr. Gardiner, you testified that by letter of April 2 you opened the contract, and did you subsequently go into negotiation with the company? A. We did.

Q. When did those negotiating meetings start?

A. I believe it was between April 7th and 10th. I think there is a little conflict on the date on that and I hope it is immaterial.

Q. I believe it is. Did SPEEA make any proposal at the opening of negotiations?

Mr. Perkins: Objection on the grounds I have already stated, Mr. Examiner.

Trial Examiner Miller: Objection overruled.

A. SPEEA did make proposals and——

Q. (By Mr. Weil—interrupting): When did SPEEA make its first proposal?

Mr. Perkins: That is objected to on the ground that it is outside of the issues, immaterial and irrelevant.

Trial Examining Miller: You may have a continuing objection, if you wish, to the entire line of examination relating to the negotiations beginning with the first meeting and carrying on to the negotiations up to January 27.

Mr. Perkins: I was about to suggest that.

Trial Examiner Miller: To the extent that that

(Testimony of Edward McElroy Gardiner.)

continuing objection is grounded on the particular basis of objection previously stated, the objection is overruled.

Should particular questions within the line merit other objections from the respondent company's point of view, you may press other such objections on other grounds.

A. In this particular case for all meetings that were held minutes were immediately made which were approved by the Executive Committee within a few hours following that particular negotiation meeting. These were distributed throughout the membership as area news releases and as such I believe should be considered as matters of record, at least in the understanding of the Executive Committee of SPEEA.

Q. (By Mr. Weil): Who prepared those minutes?

A. They were prepared by the Executive Committee.

Q. By all members of the Committee? [106]

A. Yes. It was done at a session immediately following its negotiation. These were prepared from notes taken by a scribe at the meeting.

Q. Is that an example of such releases?

Trial Examiner Miller: Let the record show that counsel for General Counsel has submitted for the witness's inspection a folder of hectographed documents.

A. Looking these over very briefly——

Mr. Perkins (interrupting): Is respondent to understand that now the Trial Examiner has opened

this hearing for the complete history of bargaining, for the complete bargaining records dating back to the opening of the contract and is regarding the issues in this case broadened to include an allegation with respect to Section 8 (a) (5) with respect to the entire period?

I would like to clear my mind as to what we are dealing with here.

Trial Examiner Miller: As I recall our discussion earlier today, it was to the effect that the General Counsel declared his position in substance as follows: That the negotiations followed a certain course which he expected to bring out in the record; that the General Counsel took no position with respect to whether or not the course of negotiations evidenced bad faith or good faith, but that whatever the evidence might show as to the course of those negotiations for purposes of presenting his case the General Counsel was contending that bad faith was [107] injected into the situation by discharge of Mr. Pearson.

Do I correctly recapitulate at this time the General Counsel's position?

Mr. Weil: Correct.

Trial Examiner Miller: In view of Mr. Perkins' objection at this time, or observation at this time, and in view of my own observation of the bulk of the documents that the witness has been asked to examine, I am going to inquire at this time, Mr. Weil, what your intention is with respect to the exploration of this subject-matter, granting that the General Counsel, as I understand it, does not

expect to make a contention that bad faith was shown in the course of these negotiations? To what extent do you expect to go into them?

Mr. Weil: Not to any great extent at all. I just expect to go into the matters of general course of bargaining, not the specific bargaining at each meeting.

You speak of the bulk of these. These are the letters from the first negotiating meeting up till March 1953. They cover almost a year. They are by no means lengthy. Each sheet I believe is one meeting, and some of the sheets are pretty short. I intend to go only into this only as a matter of background and as a matter of background not too fully. I wish to show, in other words, that offers were made, that counter-offers were made, and so forth, but I don't intend to show that on such and such a day a discussion was had concerning the [108] punching of time clocks by certain engineers or anything like that.

Trial Examiner Miller: I confess, Mr. Weil, that I am in some doubt at the present time as to just exactly what we may be opening up. If this matter is explored to any extent at all, granted that General Counsel's intention may be to more or less skim the surface and indicate the course of negotiations in general outline, may we not by this procedure open up, and properly so, for rebuttal evidence by the respondent the question of whether or not the negotiations as represented to the membership by the Executive Committee of SPEEA actually followed the indicated course?

In other words, may we not be involved in extensive litigation as to whether or not a report that was given at a given time is a correct report, when as a matter of fact, in terms of the issues the correctness of the report is immaterial.

Mr. Weil: I believe I can eliminate that possibility by using, if the company so wills, the company's own report on these negotiations. The things that I had planned to cover are not of the nature, of such a nature that there is any difference of opinion as to what took place. I don't plan to put these in evidence, for instance. I plan to use them only to jog the memory of the witness.

There were some 30 meetings, I believe, somewhere around 30 meetings, and for him to be able to sort out at what meeting and [109] at what time such and such a thing took place is rather difficult. That is the only reason I brought these to his attention.

Trial Examiner Miller: In the course of the earlier discussion, Mr. Perkins, I indicated that I was disposed to permit the General Counsel to adduce certain material with respect to the general course of negotiations by way of background on the basis of his representations that the theory of the General Counsel's case and the issues posed by the complaint did not involve any allegations of bad faith in the course of those earlier negotiations prior to January 27, and that their presence in our record would be only for the purpose of providing background with respect to the particular issues posed.

In view of the way the record has developed up to this point, I have undertaken to clarify my own understanding with respect to the General Counsel's intention, and as of the moment I think I have reached a determination as to what would be the appropriate course to follow, but I have not as yet heard from you.

Do you have anything to observe with respect to Mr. Weil's statement as to his intentions, and any statement to make on behalf of the respondent company in the light of the colloquy in which we have been engaging?

Mr. Perkins: My first comment is that his comments are not clear to me, and I have this in mind, that there is no discovery procedure as such available to litigants in Board cases. That [110] is essentially the basis for the rule of a certain school of thought among federal courts, federal district courts, particularly. Now, a complaint need be very sketchy, and that it is not a proper contention on the part of either party that the complaint does not contain allegations sufficient, or the answer, to permit a proper and thorough preparation of the case. The complaint here certainly does not do that. If this hearing is to be expanded to the depth that one might interpret from Mr. Weil's remarks—however, my first comment still holds. I think that the only way that this can be reached is to have a statement made by General Counsel as to what the intent is here. What act is it in the interval between the opening of the contract and the discharge of Mr.

Pearson which is featured in the complaint or acts, are claimed to color this in some way?

Is it the contention that the behavior of the respondent in some way brought up the point of Mr. Pearson's discharge, and then depending upon whether he was or was not engaged in protected, concerted activity, either, then it becomes black or white?

It just leaves us in a situation where it is difficult to know exactly how to answer the Trial Examiner at this stage of the proceedings.

Mr. Tillman: Mr. Examiner, as it stands now the complaint only alleges an 8 (a) (5) from January 27, 1953, and, therefore, we are not asking, and you probably would not find an 8 (a) (5) proceeding from that particular date, even if it should appear [111] in the record unless and until such time as we should amend the complaint. I think the issue is very clear. We are only alleging an 8 (a) (5) after January 27, 1953.

Trial Examiner Miller: My question then still remains. If an 8 (a) (5) is only alleged on and after January 27, 1953, to what extent are we opening up this record to extensive litigation of background material?

Mr. Tillman: Part of that paragraph nine indicates, alleges that the discharge of Pearson was for the purpose of restraining the union's economic action to break that bargaining impasse then in existence.

As I understand our purpose here is to connect up certain phases of the bargaining with the action

taken by SPEEA to counter or to get out of the impasse.

Trial Examiner Miller: In other words, if I understand you correctly, the purpose of this line would be to lay the basis to a foundation that an impasse had been reached.

Mr. Tillman: We conceded as to the impasse, but the nature of it——

Mr. Perkins (interrupting): We have admitted it.

Mr. Tillman: But the nature of it does not appear from either the complaint or the answer.

Trial Examiner Miller: I am going to permit the examination subject to motion to strike at the completion of the line, at which time I will reconsider the whole question. [112]

Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

At this time, as a result of discussion off the record with respect to the nature of the proof which the General Counsel expected to adduce, and the prospects for the further continuation of the hearing, we will recess until 9:30 a.m. tomorrow morning at the same place.

(Whereupon, at 5:45 o'clock, p.m., Tuesday, June 23, 1953, the hearing was adjourned until tomorrow, Wednesday, June 24, 1953, at 9:30 o'clock, a.m.) [113]

Trial Examiner Miller: The hearing will be in order.

Since the hearing recessed yesterday I have given some additional thought to the issues we were con-

sidering at the close of yesterday's session. I am, of course, interested in avoiding any unnecessary extension of the hearing and any unnecessary elaboration of the record and to that extent, to that end, rather, I would like to recapitulate for the record at this time the present status of the question now in issue as I see it with respect to the materiality of the line of examination which Mr. Weil sought to open up in his examination of Mr. Gardiner. I do this in an effort to determine whether such differences as the record reveals between the parties may be eliminated or avoided. Also in such recapitulation of the discussion as I may indulge in it should be understood that I am not giving a chronological narrative of what was said, but my over-all impression of the final position of the parties.

As I understand it, the problem came up originally when the respondent raised a question as to the course of conduct challenged by the complaint as indicative of bad faith bargaining. Specifically, the question was raised as to whether any allegation was intended that the negotiations in 1952-53, up to January 27, approximately, were conducted in bad faith. In response to this question the General Counsel's representative stated in substance, as I recall it, that no allegation of bad faith was [116] intended with respect to the negotiations in 1952 and '53 up to the discharge of Mr. Pearson. It was contended, however, that the discharge of Pearson tainted the situation as it then stood and injected bad faith into the negotiations, and that the subsequent increase in wages under all the circumstances ought to be

considered an additional instance of bad faith bargaining. The respondent then raised the question as to why the history of the 1952-53 negotiations had to be developed in the record if no contention was made that they were conducted in bad faith. If I interpreted Mr. Perkins' remark correctly, there was an indication that if the actual negotiations were spread on the record the respondent company would be called to develop these negotiations fully in order to protect itself against, one, a latent charge of bad faith during the '52-'53 negotiations which was possibly implicit in the present complaint, and, secondly, a possible amendment of the complaint to allege bad faith during the 1952-53 negotiations.

The General Counsel's representatives then denied any intention in the present complaint to charge bad faith in regard to the 1952-53 negotiations, and if I interpreted Mr. Tillman's remarks correctly, he stated in substance that after an amendment of the complaint to include such a charge expressly, the General Counsel only intended to spread part of the 1952-53 negotiation's history on the record to show the nature of the admitted impasse reached in the negotiations. And it was indicated that there was [117] an intent to adduce this much only as background.

Mr. Weil also in the course of the discussion indicated that the course of the negotiations would not be factually in dispute since the General Counsel was willing to rely on the notes of either party as to what actually occurred. The respondent, in

substance, raised the question as to why it was even needed as background material.

In view of the respondent's admission of the fact that an impasse had been reached at this point, in effect, I accepted the General Counsel's statement that the complaint as presently limited appeared to raise no issues of good faith or bad faith with respect to the 1952-53 negotiations prior to the January 27 discharge of Pearson. I, therefore, ruled that the General Counsel would be free to spread this history of the 1952-53 negotiations on the record to whatever extent it was deemed necessary as background to reveal the nature of bargaining impasse. This was done on the basis of my understanding of the General Counsel's contention. As I understood it, the General Counsel's contention is that a factual finding as to the nature of bargaining impasse is a necessary condition precedent to any evaluation of the respondent's conduct in contention with the discharge of Pearson and the subsequent developments. In other words, the contention appears to be that because the bargaining impasse developed in the way that it did, and because the bargaining impasse developed on the subject that it did, the respondent's conduct [118] on or after January 27, must be considered evidence of bad faith, and must be characterized as a course of conduct involving unfair labor practices.

The effect of my ruling was to permit the General Counsel to proceed subject to a motion to strike if I later concluded that the factual finding to which I have referred would be immaterial, that is, not

required for any evaluation of the respondent's subsequent conduct. In my thinking the matter over during the interval since yesterday, I find some reason, at least, to doubt the wisdom of my disposition of the problem, and I would like to pose several questions at this time in order to clarify the record and clarify my own thinking on the matter.

First of all, one preliminary observation as to this matter of background evidence, specifically, the basis on which background evidence in Board proceedings is admitted is generally regarded as admissible, and, if admitted at all, as I understand it, background evidence is admitted on the basis of a claim of relevancy and materiality. Well, then, the question arises as to how the background of any challenged course of conduct can be relevant and material in a determination as to propriety of the challenge.

Mr. Perkins: May I hear that again, please?

Trial Examiner Miller: The question is how can the background of any challenged course of conduct, specifically the background against which the discharge of Pearson and the wage increase [119] occurred, were relevant and material in a determination as to the propriety of the challenge in this case, the challenge to the discharge of Pearson and the wage increase. Certainly it can be relevant and material only if it is contended that a factual finding as to the background matters will affect the evaluation to be made of the challenged matters.

Now, the first question that occurred to me is this, why is a factual finding as to the nature of

the bargaining impasse needed to evaluate whether the discharge of Pearson envolved unfair labor practice. On that point I confess some difficulty, as I thought about the matter last night.

The second question is why is a factual finding as to the nature of bargaining impasse needed to evaluate whether the unilateral wage increase involved unfair labor practice. On this I had less difficulty, having in mind the language used by Justice Burton in the disposition of the Compton Highlands case which recapitulated much of the Board's thinking in this field. As I understand it, under the language used by Justice Burton in that decision the nature of a bargaining impasse is material in determining whether a subsequent wage increase involved unfair labor practices, and it was my knowledge with respect to the state of the Board's law and the decision of law in this field that impelled me originally to my ruling that the General Counsel should be permitted to proceed. With respect to the first question that I raised as to whether the factual finding as to [120] the nature of bargaining impasse is needed to evaluate whether the discharge of Pearson involved an unfair labor practice, do the General Counsel's representatives have any observations with respect to that issue that involves something that has escaped me so far?

Mr. Perkins: Before they answer, may I supplement my remarks on this subject of yesterday?

Trial Examiner Miller: Yes.

Mr. Perkins: It is not respondent's intention to object to the materiality or relevancy of any dis-

cussions in the negotiations bearing on the matters specifically mentioned in the complaint as follows:

The unilateral increase, the manpower availability conference——

Trial Examiner Miller (interrupting): Very well.

Mr. Perkins (continuing): ——the discharge of Mr. Pearson.

Trial Examiner Miller: Mr. Tillman, are you prepared to make any statement on the behalf of the General Counsel as to the basis on which a factual finding as to the nature of the bargaining impasse is relevant and material on the issue of the discharge of Mr. Pearson?

Mr. Tillman: May I consult Mr. Weil?

Trial Examiner Miller: Yes, sir.

Mr. Tiller: Mr. Examiner, it is the feeling of General Counsel that the nature of the impasse and the background of [121] negotiations is relevant to the contention that the activity engaged in by Mr. Pearson was a concerted action. Now, it is possible that one might view his activities in isolation as concerted, but in view of the fact that the company is contending that they were not concerted, but they were in effect in a nature not protected by the act, I don't see how a Trial Examiner or a Board or a Court can view his activities without seeing the entire background. In other words, the issue before you was, were his activities concerted, and, secondly, were they protected.

Trial Examiner Miller: I am glad to have your theory in that respect spelled out in that fashion.

Mr. Perkins: I would appreciate an elaboration

of that, if Mr. Tillman would be good enough to do so. First of all, as to the issue as to whether it is concerted activity, are you referring to concerted in the sense of concerted in the direction of the respondent here or are you referring to concerted in the sense of a collective activity of a group of employees as distinguished from the isolated act of an individual as such in an unidentified group of employees?

Mr. Tillman: Concerted, as I refer to it, I refer to Section 7 of the Act itself, which is a very broad definition. It may or may not be. First—Let me strike that. I would suppose, my understanding of concerted activity, it is not necessarily required that the activities be shown to be directed against any particular company, if the activity were performed in concert [122] and had as their purpose, as stated in Section 7, the purpose of collective bargaining or of a mutual aid or protection.

Trial Examiner Miller: I take it from Mr. Tillman's answer, Mr. Perkins, that he is using concerted as mentioned by you in your inquiry.

Mr. Perkins: Then I am at some loss as to the bearing that collective bargaining negotiations have on that point. It seems to me that the test of whether or not these activities were concerted is a description on the record of the activities themselves. If the essence of the definition is acting in concert, it seems to me that the evidence that is pertinent there is evidence of the type that has alrady been produced as to whether Mr. Pearson was acting in con-

cert with certain individuals identified in a specific group.

As to the development of the collective bargaining negotiations themselves, I am at a loss to see the pertinency of that point on this matter of the nature of the impasse. Perhaps I don't understand the full implication of the term. If there is an impasse, it seems to me that the issue with respect to that point as made becomes clear. What I have in mind is, that if there is a record of bargaining in bad faith on the part of the employer under 8 (a) (5) or on the part of the union under 8 (b) (3) and unilateral action is taken by the employer if it is an 8 (a) (5) or by the union under 8 (b) (3), then I do not see how it can be correctly regarded as an impasse, because there is no [123] impasse, if there has been no violations of 8 (a) (5) or 8 (b) (3) up to the point of impasse. The very essence of the definition of impasse, at least within my view, is that it means just what it says, an impasse. And an impasse in the eyes of the Board or within the purview of the statute here is not such, if there is some taint in the behavior of either or both of the parties preceding that.

Trial Examiner Miller: Just by way of general observation, I think that your observations, Mr. Perkins, raise a number of questions not directly related to our proceeding with respect to the whole philosophy with the Board's thinking in this field. The sense in which I believe Mr. Tillman used the word, certainly the sense in which I used the word, related only to this, an impasse in negotiations, as

I understand the law on the subject, may develop either because of the conduct of the parties leading one party or the other to feel that further negotiations are fruitless or would be fruitless, or a genuine difference to the subject matter irreconcilable by further discussion. And when I made my preliminary remarks, I spoke of the fact that an impasse may have developed here, I did not know as of the moment, I do not know as of this moment either, by way of the manner in which the negotiations were conducted or the subject matter of the discussion, and I had those two aspects of the problem in mind as possibly bearing on the nature of the impasse.

I take it on the basis of the Board's law on the subject, [124] as I understand it, that a genuine impasse can develop in negotiations which do not involve unfair labor practices or any taint of bad faith. By virtue of the fact that the negotiations have proceeded in a certain manner, or that there has been a genuine difference of opinion on the subject matter of the negotiations as reconcilable by further discussions, it more commonly arises in the latter type of case where there is a difference of opinion on the subject matter, and the sort of thing about which Justice Burton was talking in the Compton Highlands case was an irreconcilable difference on the subject matter of a wage increase. And that is what I had in mind when I said that my ruling permitting the General Counsel to proceed with their line was intended to permit him to develop that aspect of the case if it existed factually

here, that is, to develop whether or not there was an impasse on the wage issue, what the differences of opinion were, at a point where discussion ceased or came to a virtual standstill as to what the company then did.

Mr. Perkins: I would be willing to stipulate on that.

Trial Examiner Miller: That raises the question I was then coming to.

My ruling of yesterday was to the effect that General Counsel could proceed to adduce evidence and that I would then at the conclusion of the line entertain a motion to strike if I felt that the record as it *then should* revealed the line to be immaterial. I have come to the conclusion that that procedure [125] may be somewhat risky in terms of opening up our record for unnecessary elaboration and unnecessary litigation of the material that may not be factually in dispute, and I am wondering whether, for the General Counsel's purpose, in view of the facts and that Mr. Weil said yesterday that he would be willing to rely upon the respondent company's notes as well as the testimony of Mr. Gardiner, I am wondering whether a stipulation may not be possible. Would you like to explore that?

Mr. Tillman: A stipulation might be possible, to cover the negotiations, but it would not take care of explaining why SPEEA took a certain course of action in view of the parallel status of negotiations. And that was the main purpose, I mean that was the purpose of going into inquiry with Mr. Gardiner, to show that in an effort to negotiate SPEEA

took certain steps in connection with MAC. Mr. Weil was trying to indicate the status of negotiations, as Mr. Gardiner would testify, was probably not in dispute, but it is merely in explanation that SPEEA took certain action that it did.

Trial Examiner Miller: In other words, the General Counsel expects to adduce, if I understand you correctly, is in effect along this line, that as of a certain date negotiations had reached a particular point which Mr. Gardiner would describe and that SPEEA then did in the light of the situation as it then stood, SPEEA did so and so?

Mr. Tillman: That is correct. [126]

Mr. Weil: That is right.

Trial Examiner Miller: Very well, I will adhere to my original ruling.

EDWARD McELROY GARDINER

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continuing)

Mr. Weil: Inasmuch as my last question, which was objected to, is buried pretty deep in the record I will restate it, and I will start that line of questioning over, with your permission.

Trial Examiner Miller: Surely.

Q. (By Mr. Weil): Would you give us as succinctly as possible the story of the course which negotiations took from the inception of negotiations after the letter of April 12, 1952, onward?

A. At the first meeting——

(Testimony of Edward McElroy Gardiner.)

Mr. Perkins (interrupting): My recollection is that there is a continuing objection on that.

Trial Examiner Miller: Yes, there is.

For the record the objection is overruled.

A. (Continuing): ——at the first meeting a SPEEA proposal was made to the company which consisted of stating that it was our object in negotiating to negotiate for a wage increase, changes in overtime and also stipulated that we considered it proper to introduce later on into the negotiations other items.

A few meetings later the prospective general increase requested was clarified and the statement was made that one and a half times for overtime was our request. Our proposal——

Q. (By Trial Examiner Miller—interrupting): May I interrupt for a moment, Mr. Gardiner? When you say that the percentage of increase was clarified, was SPEEA at that time, at that point, requesting an across-the-board increase in a given percentage or were you requesting varying percentages from different levels of salaried payment?

A. At that particular point our request was for 30 per cent across-the-board.

Trial Examiner Miller: Very well.

A. About six meetings later—this is approximate in my mind—the company made an offer to the SPEEA organization of six per cent plus an offer on overtime, which is a matter of record. This offer was refused by SPEEA and subsequently meetings indicated that an impasse had been

(Testimony of Edward McElroy Gardiner.)

reached. In an effort to break up this impasse——

Q. (By Mr. Weil—interrupting): Just a minute, please. A. Surely.

Q. Can you tie this down to any extent with dates approximately?

A. Yes; the offer from the company was made on June 27.

Q. That is the offer of six per cent?

A. Six per cent. [128]

Q. (By Trial Examiner Miller): Was that also across-the-board?

A. Yes, that is correct. And this offer was rejected shortly after by a ballot of the membership.

Following the impasse, the services of a mediator, concilator, were called. During the series of meetings held with the federal conciliator, additional items were brought into the negotiations at the request of the conciliator. Our purpose in doing this was——

Mr. Perkins (interrupting): I would supplement the continuing objection by objecting to the response of the witness on the ground that the purposes in connection with offers are not pertinent to the issue upon which I understood the Trial Examiner to regard this line of testimony as possibly pertinent. I understood that the course of bargaining as to dates was to be tentatively considered as pertinent by the Trial Examiner having in mind that the purpose of this is to show a correlation between the pattern of the bargaining and the pattern of the contended protective concerted

(Testimony of Edward McElroy Gardiner.)

activity. And with that in mind I do not think that the purpose of SPEEA, its motivation in concerted offers, too germane to that issue.

Trial Examiner Miller: The witness's testimony at that point was interrupted. I am not sure that his thought was fully developed. I will permit him to proceed and entertain a motion on the grounds that you have stated.

The Witness: My thought was interrupted on that. Could [129] you bring me back to the point?

Q. (By Trial Examiner Miller): You had reached a point in which additional matters were injected into the negotiations at the suggestion of the conciliator.

A. Correct. This was done in order that the company might have a clear picture of all issues that were on our mind.

Q. (By Mr. Weil): What were those additional elements?

Mr. Perkins: I move to strike the answer, Mr. Examiner, on the same ground.

Q. (By Trial Examiner Miller): Was the purpose of SPEEA in introducing these additional issues the subject of discussion at the meetings with the conciliator? Was this purpose ever actually spelled out or was it just a mental purpose?

A. It was.

Q. Spelled out?

A. It was spelled out.

Trial Examiner Miller: Objection overruled.

(Testimony of Edward McElroy Gardiner.)

Mr. Perkins: May I hear the last question and answer, please, Miss Reporter?

(Question and answer read.)

A. As a result of the discussions which followed in the presence of the mediator, it was determined that the actual impasse had disappeared.

Q. (By Trial Examiner Miller): Impasse of what? [130]

A. The impasse which caused SPEEA to request the services of a conciliator in the first place.

Q. The impasse was on what subject or subjects?

A. On the subject of wages, working conditions, the subject of negotiations up to the entrance of the federal mediator.

Q. You had mentioned in your testimony only negotiations up to that point with respect to the subject of wages and overtime. Had there been others?

A. I am trying to remember whether sick leave at that time was considered a pertinent issue.

Q. Specifically, I am not interested so much in all of the subjects that were discussed but on the subjects on which an impasse developed with respect to which it was felt necessary to introduce the conciliation service. Did the impasse develop on any subject other than wages and the overtime issue?

A. The company's offer in this particular case concerned itself only with wages, and I believe the sick leave clause, and in this particular case a re-

(Testimony of Edward McElroy Gardiner.)

jection was made by the membership, and so it was considered that an impasse had been reached.

Q. With respect to those two issues?

A. With respect to those two issues.

Trial Examiner Miller: Very well.

Q. (By Trial Examiner Miller): You have now reached the point at which you testified that the impasse had been broken as a result of the discussions with the conciliator. [131]

A. Yes. The discussions were in the presence of the conciliator at this meeting. And it was agreed to dispense with the services of the conciliator in the future for an indefinite time. The following negotiations took place under an atmosphere of——

Mr. Perkins (interrupting): I would prefer to have the testimony confined to the facts.

Trial Examiner Miller: Objection sustained.

Q. (By Mr. Weil): Can you give me the approximate date on which the negotiator was called in?

A. I believe I'd have to refresh my memory by a reference to the chronology of this. I believe it was in July.

Q. Can you tell me approximately how long the negotiator continued to operate with you, how long his participation continued?

A. I wasn't present at all of the meetings. I believe that there were three. There could have been more.

Q. (By Trial Examiner Miller): Over how long a period of time?

(Testimony of Edward McElroy Gardiner.)

A. That is another vague part in my mind here. May I refer to the facts on this particular case, records?

Q. (By Mr. Weil): Yes. I will show you the area representative's letter about which you testified yesterday, dated 9/11/52, with particular reference to that section headed by "Summary". Would you read that, please? A. Yes.

Q. Does that serve to refresh your recollection, Mr. Gardiner? [132]

A. The last meeting was held in the mediator's office September 11.

Q. After you dispensed with the mediator, what was the course of negotiation?

A. SPEEA and Boeing Airplane Company agreed to form a joint subcommittee to further investigate certain data which had been prepared by SPEEA and presented in the previous negotiations. Two representatives from the company and from SPEEA were selected to prepare joint data which would not in itself be a cause for argument. In addition, the results of the MAC poll, which had been conducted, were presented to management——

Q. (Interrupting) When was this MAC poll conducted? Was this after you dispensed with the mediator?

A. I don't have this chronology complete in my mind.

Mr. Examiner, this is why I requested the use of reports, was merely to satisfy the chronology of the events.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: Very well, I am satisfied that the witness's recollection may properly be refreshed, if refreshment is available.

Mr. Weil: I believe it is.

The Witness: Mr. Examiner, I am referring to my own notes and have the data available. If this is permissible——

Trial Examiner Miller: Let the record show that the examiner has been advised that the witness has been able to determine the data by reference to notes now in his possession. [133] If counsel wishes to inspect the notes, they are at liberty to do so.

Mr. Perkins: I don't desire to do so.

Trial Examiner Miller: Very well. You may proceed, Mr. Gardiner.

A. The MAC report was given to the manager on or about 9/29/52.

Trial Examiner Miller: Very well.

The Witness: Does that answer your question?

Q. (By Mr. Weil): Yes. To tie that in, is that the same date, is that date the same about which Mr. Pearson testified that the management was informed that the action on MAC had been tabled for—— A. (Interrupting) That is correct.

Q. Continue with your——

A. (Interrupting) Yes.

Another item had been brought up in the negotiations at this time concerning itself——

Q. (Interrupting) At this time do you mean——

(Testimony of Edward McElroy Gardiner.)

A. (Interrupting) During these periods of negotiations following the dispensing of the mediator concerning the subject and agreement made between members of Aircraft Industries Association——

Mr. Perkins (interrupting): Just a minute. This perhaps is an appropriate time to raise the point that was mentioned earlier in these proceedings. In view of the fact that the complaint does not mention anything about this as being about [134] the so-called gentleman's agreement between the various aircraft companies and the Aircraft Industries Association, I would suggest that it would be appropriate for representatives of the General Counsel to state what they propose to introduce in that connection and permit me to address a proper objection to it, and, if, again, the Trial Examiner considers it appropriate to have a continuing objection, why I would suggest that, if the ruling is adverse to respondent, it is just by way of suggestion.

Mr. Tillman: Mr. Examiner, at this point, at this time, the witness just merely said that this came in as an issue, so this, as I take it, is covered by your previous ruling that this is one of the issues in the bargaining we are introducing for background. I thinks Mr. Perkins' objection, if that is what it is, is somewhat premature.

Trial Examiner Miller: That is true. He introduced the point before any statements were made on the record or any question asked as to what the

(Testimony of Edward McElroy Gardiner.)

negotiations were with respect to the gentleman's agreements or what the content of the gentleman's agreement was, but may I ask does the General Counsel expect to adduce any evidence on that point other than the mere fact that a gentleman's agreement was a subject of the discussion?

Mr. Weil: Yes.

Trial Examiner Miller: Then I take it that Mr. Perkins' point is well taken. I will request an offer of proof as to this particular matter. [135]

Mr. Weil: As to the gentleman's agreement?

Trial Examiner Miller: Yes.

Mr. Weil: The General Counsel offers to prove that there was in existence, among the members of the Aircraft Industries Association, an association of apparently most, if not all, of the companies engaged in the production of aircraft and aircraft parts, an agreement not to hire employees from one another. This agreement has, whatever the agreement may be in itself, and we are unable to adduce proof as to that at this time, the agreement has had a certain and very definite effect on the members of SPEEA in their thinking towards the MAC. In other words, the MAC is at least partially based upon a desire to get around or override the gentleman's agreement. As such the gentleman's agreement is a definite causal factor of the MAC and certainly part of the background upon which the MAC should be considered, if it is to be, if an adjudication is to be, as to whether MAC is a protected, concerted activity.

(Testimony of Edward McElroy Gardiner.)

Mr. Perkins: Am I correct in interpreting counsel's remark to say in essence that the General Counsel does not propose to prove any gentleman's agreement so-called but intends to prove only reference to what is contended to be an agreement in the bargaining negotiations?

Mr. Weil: No, that is not a correct statement. The General Counsel intends to prove the impact of the gentleman's agreement upon the situation which the Board has here before it, that in [136] proving that impact the General Counsel will necessarily be led into the MAC as it was understood to exist to the members of SPEEA. I mean the gentleman's agreement as it was understood to exist by the members of SPEEA. For that purpose, the General Counsel intends to put in certain evidentiary matters, including the letter explaining the A.I.A. gentleman's agreement written by Mr. Logan, and certain other letters, which, I believe, will have a tendency to prove what the gentleman's agreement actually is. To that extent I would say that your summation is correct.

Trial Examiner Miller: Let me ask this in the light of Mr. Perkins' question. Will I, as a Trial Examiner, be required or called upon to make any finding of fact as to what the gentleman's agreement consisted of or will I be required to make a finding as to what the members of SPEEA understood it to involve?

Mr. Weil: The latter.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: Very well. Does that answer your point?

Mr. Perkins: I understand your answer to the question to be, to mean, to prove the agreement? Am I correct in that? I understood he is referring to a letter from Mr. Logan in which what is referred to as a gentleman's agreement and how it works is described. I am not too clear as to what the answer meant.

Is it intended that the agreement be proven or is the Trial Examiner—— [137]

Trial Examiner Miller (interrupting): I take it that agreement could be proven in a legal sense only by competent evidence by a person qualified to testify as to what the agreement was.

Mr. Perkins: That would be my understanding.

Trial Examiner Miller: So that if the letter and other letters are offered merely to prove that certain concepts with relation to the agreement were communicated to SPEEA members, that would not be, in my view, proof of the agreement.

Mr. Perkins: If that is the intention I think I am clear on General Counsel's statement or what their intended proof is to be.

Mr. Tillman: I might make one supplemental statement. As I see it, we are not barred from making proof of the agreement as well as SPEEA's understanding of it. If both of them go in, so much the better, but as far as we are concerned we only need to show SPEEA's concept of the gentleman's

(Testimony of Edward McElroy Gardiner.)

agreement, and the extent to which concept then affected their action on MAC.

Mr. Perkins: On that point, Mr. Tillman, I would at least take the position on behalf of respondent that you are barred from proving such an agreement as being pertinent to the issues in this case, because it seems to me that within the statute and within the rules of the Board it would be necessary in order to allege the agreement in the complaint, to describe it in terms or the general purport of it, and allege in the complaint, as I understand your contention, that the concerted activities of the [138] SPEEA organization here are in a sense protected by reason of its existence and by its existence I mean the existence of the so-called gentleman's agreement.

Mr. Tillman: I think you somewhat misunderstand the significance of a complaint, Mr. Perkins. We are not alleging the gentleman's agreement as an unfair labor practice and, therefore, as I see it, do not have to make any allegation concerning it in the complaint. We have asserted in the complaints generally that Mr. Pearson, while engaged in a concerted activity was discharged, and that the action of discharging him constituted also a violation of 8 (a) (5) in connection with certain other activities of respondent, none at all being based on the gentleman's agreement, if it exists or does not exist.

Trial Examiner Miller: Essentially, Mr. Perkins, as I understand the issue now, in the light of the

(Testimony of Edward McElroy Gardiner.)

offer of proof, let me try to be as specific as possible. Especially what the General Counsel appears to be trying to prove is that the gentleman's, that the MAC is a protected, concerted activity as the General Counsel sees it, because it was an attempt on the part of a group of employees of SPEEA to overcome a limitation on their freedom to seek employment in the industry or a limitation on the availability of employment in the industry. Now, whether or not proof of that type would justify a conclusion that the concerted activity is protected is something for me to determine and something for the Board to determine. Especially, as I see it, [139] that is what the General Counsel appears to be after.

Do I correctly state it, Mr. Tillman?

Mr. Tillman: That is correct.

Mr. Perkins: My only point is, Mr. Examiner, if the contention that the activity is protected is based upon the existence of an agreement which I understand to be a position of General Counsel, it seems to me that at least within my concept of the functions of the complaint that the agreement should be alleged as described and respondents given an opportunity to explore the issue and the contention as such prior to the time of hearing.

Trial Examiner Miller: My impression at the moment, and, if necessary, I will express this in a formal ruling, my impression at the moment is that on the theory of the General Counsel's case, as I understand it, allegation of the agreement and

(Testimony of Edward McElroy Gardiner.)

proof of the actual content and scope of the agreement need not be spelled out in General Counsel's complaint. Now, insofar as this affects the proof, I take it, that what we are confronted with is this, General Counsel expects to prove that the members of SPEEA had a certain conception of the limitations on their freedom of the contract posed by the gentleman's agreement, that they undertook certain concerted action to overcome these limitations on their freedom of contact, that the General Counsel's ultimate theory then would be that concerted action taken to overcome a limitation on one's freedom of contract is a protected, [140] concerted action or activity, or should be regarded by the Board as such.

Mr. Perkins: Is that the General Counsel's position?

Trial Examiner Miller: Is that the General Counsel's position? Is my assumption correct?

Mr. Weil: Your assumption is correct, except that that is not the only grounds on which we feel the activities are protected. But that is one of the grounds.

Mr. Perkins: Perhaps I can shorten this, Mr. Examiner. If this is the General Counsel's position, then the question is posed as to whether respondent should request the continuance of the hearing to prepare on that issue, and I can state to you now we are prepared to go forward, but we will object to the relevancy of the evidence along that line.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: Very well. Without expressing any opinion at this time as to the validity of the General Counsel's ultimate contention in this regard, I am going to permit the General Counsel to make their record, and you may have your continuing objection.

We will be in recess for five minutes.

(Short recess.) [141]

Trial Examiner Miller: The hearing will be in order.

Q. (By Mr. Weil): Mr. Gardiner, you were stating that the matter of the gentleman's agreement had come up in the course of discussion. Would you go on there, please?

A. Yes, then a letter from the company was requested explaining the company's understanding of the agreement, and such a letter was received from Boeing Airplane Company in a letter dated October 13.

Mr. Weil: Would you mark this, please, as General Counsel's No. 10.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Q. (By Mr. Weil): Is this the letter to which you have reference? A. Yes.

Mr. Perkins: May I ask the witness a question, please?

Trial Examiner Miller: Surely.

Q. (By Mr. Perkins): Mr. Gardiner, I notice some red pencilling here at the top of this General

(Testimony of Edward McElroy Gardiner.)

Counsel's ten for identification. Was that on the letter when you received it or can you explain it?

A. No.

Q. The answer is no? That was put on the letter after you received it?

A. Yes. As far as I know it didn't arrive in that form. In [142] other words, my comment is that this was the letter and it doesn't indicate the admissions that have been made.

Mr. Perkins: Respondent has no objection to the admission of the letter subject to the objection which I understand to be continued.

Trial Examiner Miller: Yes.

General Counsel's Exhibit No. 10 will be received.

(The document heretofore marked General Counsel's Exhibit No. 10 for identification, was received in evidence.)

[See page 503.]

Q. (By Mr. Weil): In response to your receipt of that letter, was the matter discussed further?

A. The matter was discussed and the objections which SPEEA had to their understanding of the gentlemen's agreement as read from the letter and as judged from the receipt of letters sent to individuals.

Mr. Perkins: May I ask that the latter part of that answer be stricken on the grounds that it is not the best evidence, that it expresses, I believe, something in the nature of an opinion. I didn't think it was responsive.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: I will sustain the objection. That portion of the witness's answer which indicates a judgment based by letters received by individuals, an objection is sustained thereto.

Q. (By Mr. Weil): Was your judgment based on any evidence other than the evidence contained in the letter which has been received in evidence as General Counsel's Exhibit No. 10? [143]

A. Perhaps I can say it this way, that we have——

Mr. Perkins: I believe the question calls for a yes or no answer.

Trial Examiner Miller: Yes.

A. Yes.

Mr. Weil: Will you please mark for identification General Counsel's Exhibits Nos. 11, 12, 13, 14, and 15.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 11 through 15, inclusive, for identification.)

Mr. Perkins: Mr. Examiner, may we go off the record momentarily?

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Q. (By Mr. Weil): Was the committee shown other letters addressed to individuals?

Mr. Holman: What committee are we referring to now?

Mr. Weil: The Executive Committee.

(Testimony of Edward McElroy Gardiner.)

A. The Executive Committee was shown other letters.

Q. (By Mr. Weil): To whom were these letters addressed, to the Association, or to individual members? A. To individual members.

Q. Did the individual members take the matter up with the Association or with the Executive Committee? [144]

Mr. Perkins: I object to that, as to what matters we are referring to. The exhibits are not in evidence yet.

Mr. Weil: I am trying to lay a foundation to put them in evidence.

Trial Examiner Miller: I will overrule the objection.

Mr. Weil: Would you repeat the question, please?

(The question was read as follows:

"Q. Did the individual members take the matter up with the Association or with the Executive Committee?")

A. The individual members did take the matter up with the Executive Committee acting for the Association.

Q. (By Mr. Weil): Did they show you the letters that they had received? A. Yes.

Q. Are these (indicating) the letters which they showed you? And I'll show you General Counsel's Exhibits for identification numbered 11 through 15.

A. These letters were shown to members of the Executive Committee at different times. I feel I must state this for the record. In other words,

(Testimony of Edward McElroy Gardiner.)

when these are properly identified I can state that these have been shown before the time in which this matter was brought up to the company. Now, two of the letters dated the 8th of January and the 20th of January were not shown to the Executive Committee until after the MAC had been started in this particular case, and so I don't know whether this [145] constitutes a proper assembly of the evidence.

Q. That is the question I asked. As a result of these letters, was the factual situation which confronted the Executive Committee in their action regarding the MAC substantiated or changed?

Mr. Perkins: I don't understand that question.

Trial Examiner Miller: I don't either.

Q. (By Mr. Weil): Did the knowledge of these letters by the Executive Committee and the knowledge of the contents of these letters by the Executive Committee change the opinion of the Executive Committee and their subsequent actions in regard to the MAC or substantiate the actions which the committee had at the time they received such knowledge, the intention of taking——

Mr. Perkins: Excuse me for interrupting you, Mr. Weil. It seems to me that that question is more appropriate as to the ruling on the admissibility of these exhibits. We don't know anything of the contents as a part of the record in this case at this point, and it just doesn't seem to me that the pertinency of a question is apparent at this point in the record.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: I think the objection is well taken.

Mr. Weil: Let me at this time offer the exhibits.

Mr. Perkins: These exhibits 11 through 15 for identification are now offered, as I understand it. Respondent objects to the admission of these exhibits under respondent's continuing objection as to the relevancy and materiality of the subject [146] matter dealt with in these letters and as to the matters sought to be proven by these letters, and to the extent that these letters are offered in evidence for the purpose of proving or tending to prove an agreement between respondent and other companies, aircraft companies included. Respondent objects on the ground that the letters are not the best evidence, and on the further ground that the letters amount to hearsay evidence.

Trial Examiner Miller: The objection is overruled.

The exhibits will be received.

(The documents heretofore marked General Counsel's Exhibits No. 11 through 15, inclusive, for identification, were received in evidence.)

[See pages 507-511.]

Q. (By Mr. Weil): Mr. Gardiner, you mentioned most recently, quite recently, that because of the impasse which the information about the AIA gentlemen's agreement had on the negotiating committee that you brought up——

Mr. Perkins (interrupting): I object to the form

(Testimony of Edward McElroy Gardiner.)

of question referring to the impasse. If the intention of the question is to bring out from the witness what the Executive Committee did by reason of the receipt of these letters, I have no objection.

Trial Examiner Miller: I so understand it.

Is there more to the question?

Mr. Weil: I so intended it.

Mr. Perkins: I have no objection.

Trial Examiner Miller: Very well.

A. With the letter from Mr. Logan of October 13th, with the [147] letters indicated in evidence, and with indication of other letters, which have not been admitted as evidence in this case, the subject was discussed with the company in following negotiations sessions and the reasons for our concern over this gentlemen's agreement were expressed to the company, at subsequent meetings at Boeing Airplane——

Mr. Perkins: May I ask that the remark with reference to other letters be stricken. These are the letters that have not been admitted into evidence.

Trial Examiner Miller: The remark will be disregarded.

A. In a formal negotiation meeting with Boeing Airplane Company two questions were asked of Mr. Logan. The first question was that in view of our concern of the effect of the AIA gentlemen's agreement upon the freedom of the individual engineer to form a contract or seek employment elsewhere, we requested that the company cease and desist from its continuance of the understanding or agree-

(Testimony of Edward McElroy Gardiner.)

ment as was expressed in the letter of October 13. Mr. Logan said they would not. Secondly, and in view of this refusal, the company was asked whether they would permit an inclusion in the contract which we were in the process of agreeing to, would include provisions which would allow activities such as the MAC to be conducted and permitted as a definite part of this contract. This was refused.

Q. (By Trial Examiner Miller): Do you remember the date on that or the approximate date of the conference at which these [148] two issues were raised?

A. I will refer to my notes, if you would care for me to.

Q. If you would.

A. This meeting was held on or about December 5, 1952.

Trial Examiner Miller: Go ahead.

Q. (By Mr. Weil): To return to a subject that we mentioned rather briefly yesterday, Mr. Pearson in his testimony estimated that on October, about or on about the first of October, I believe it was, the membership of SPEEA was something like 2,000. When you took the stand you estimated that it was something like 1,300. Have you had occasion to refresh your recollection in the meantime?

A. Yes.

Q. Would you tell us about it, please?

A. In order to refresh my memory on that I checked the actual membership listings at that time

(Testimony of Edward McElroy Gardiner.)
and found it to be 2,100. I feel that that correction should be inserted.

Q. (By Mr. Weil): Was that November 24? Did I give the wrong date?

Q. (By Mr. Perkins): May we go off the record?

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Let the record show that during the period of the discussion off the record a question was raised with respect to the date [149] of the meeting questioned by the Trial Examiner, and that there has been some clarifying discussion with respect to the date of that meeting. As a result of that clarifying discussion, are you in a position to state your present understanding with respect to the date of meeting, Mr. Gardiner?

The Witness: Yes; the date of the meeting is on or about November 24.

Trial Examiner Miller: Very well.

Q. (By Mr. Weil): As a result of Mr. Logan's refusal, relative to his answer to the two questions that you mentioned in that negotiating session, which apparently took place on November 24, was the Executive Committee moved to take any further steps concerning the MAC?

A. The SPEEA Executive Committee did not take any steps at that particular time, because other items were under consideration at that particular time also. The company had made us an offer to

(Testimony of Edward McElroy Gardiner.)

which we were at that time suggesting certain alterations. This concerned the retro-activity clause of overtime and an anniversary date, and we wished to have a clarification of the company position on these two questions before subjecting the company offer to a membership ballot. This clarification was received from the company and the ballot taken.

Q. Can you approximate the date of that ballot?

A. It was early in December, I believe.

Q. That is close enough. [150]

A. Final comment on the negotiations was our decision in view of the impasse reached by virtue of the company's stating that last offer was their ultimate position, and the majority of the membership indicating their refusal to accept this offer, was to start the MAC activity and we so notified the company, and this was done in the letter which I believe has been offered in evidence. Is that right?

Mr. Perkins: Let's identify that exhibit for the record.

Trial Examiner Miller: No. 5, General Counsel's 5.

Mr. Tillman: May I ask the witness, what date was that decision made, again, to go ahead with the MAC more or less?

The Witness: The latter part of December.

Q. (By Trial Examiner Miller): Mr. Gardiner, you speak of an impasse reached which impelled the Executive Committee to go ahead with MAC. Let me ask, as of this date in December, when

(Testimony of Edward McElroy Gardiner.)

the membership had rejected the company's last offer, had that offer included any statement of a company position with respect to a wage increase which differed in any way from their original offer of six per cent?

A. No. There was an additional unilateral indication of company intent——

Mr. Perkins: I ask that that be stricken.

Trial Examiner Miller: I will permit the witness to finish the statement and entertain a motion to strike.

A. (Continuing) ——to increase one form of remuneration to the [151] membership, namely, that of the Merit Review Plan and for clarification, in the past, the company has in the past, allocated approximately three per cent of the payroll to raises granted throughout the representation, three per cent per annum, I should say, in this case, and the company stated that it was their intention to raise this to six per cent or three per cent per review with two reviews being given per year. This was not to be part of the contract.

Q. (By Trial Examiner Miller): This statement of company's position had been made before balloting to the membership on the company's last offer?

A. That is right.

Q. And the last offer insofar as a general wage increase was concerned indicated no change in the company's position concerning a general increase?

A. That is right.

Trial Examiner Miller: Very well.

(Testimony of Edward McElroy Gardiner.)

A. In the letter of transmittal of the indication letter of the MAC.

Q. (By Trial Examiner Miller): General Counsel's No. 5?

A. General Counsel's No. 5. One section indicated that the MAC had been started in view of the restraint of freedom on the right of engineers to seek other employment as we understood the gentlemen's agreement. Now, I would like to be able to refer to General Counsel's No. 5 for clarification on that. If you [152] wish me to get this, why, I can.

Q. You may quote it, if you wish, or may refer to it by designation in the exhibit.

A. The paragraph three of the exhibit states, "This conference is being conducted for the following purposes:

"'(a) To provide members with improved opportunity to bargain for their services. Our membership"——

Mr. Perkins (interrupting): The letter is in evidence, Mr. Examiner.

Trial Examiner Miller: I realize that. I will permit the witness to quote.

A. (Continuing) ——"Our membership has requested SPEEA to restore the freedom and privacy of engineers who seek to improve their situations by changing employers.

"'(b) To obtain data on the true market value of engineers with various amounts of experience.'"

Trial Examiner Miller: Mr. Weil.

(Testimony of Edward McElroy Gardiner.)

Q. (By Mr. Weil): Mr. Gardiner, the MAC having been put on the road by the Executive Committee, and was the Executive Committee then watching the MAC Committee's actions closely so that you were aware of the individual steps taken by the MAC Committee in getting this show on the road?

A. Yes. Through our liaison officer in this particular case, who kept cognizance of the activities of the MAC Committee. This committee was one of a large group of committees, and, therefore, [153] complete cognizance was not kept by all members of the committee.

Q. To go back to this last offer or the ultimate offer of the company, was that offer less than the original offer or more than the original offer that was made in July?

A. The company offer as such was less by virtue of the retroactivity clause on overtime.

Q. Would you explain that.

A. Yes. At the offer made in July, the company had stated that it was their intention to pay overtime in a manner indicated, which we have called the "Lockheed formula", such overtime payments to be made retro-active to the anniversary date of the contract, which was in July 1. The last offer stated that the general raise would be granted on six per cent and that this general raise provision would be retro-active to July 1, and that the overtime would start as of January 2, and that there would be no retro-activity.

(Testimony of Edward McElroy Gardiner.)

Q. January 2, 1953? A. 1953.

Q. As to the letter, General Counsel's Exhibit No. 5, which was sent to the company, what was the next indication or response that you received to that letter from the company of their awareness of their receipt of the letter?

A. The response that occurs to me in this particular case was word from Mr. Pearson that he had just been terminated by the company. [154]

Q. Had you been informed prior to the time that you received this word from Mr. Pearson that he was to be terminated or that he had been terminated? A. No.

Q. Did you as chairman of the Executive Committee take any action on hearing on Mr. Pearson's termination?

A. Yes. After conferring with Mr. Pearson in a meeting of the members of the Executive Committee, we first offered him employment in SPEEA in order that his income would not be cut, and, secondly, requested a negotiation of this particular incident with the company.

Q. (By Trial Examiner Miller): Before you go ahead with this particular subject, Mr. Gardiner, there is a question that occurs to me. I am not sure that our record is clear on this point as yet. But with respect to what has been described as the company's ultimate offer, that is, the status of its offer in December, you indicated that there was a ballot of the membership and that the membership rejected the company's offer as it then stood.

(Testimony of Edward McElroy Gardiner.)

A. That is correct.

Q. Was the fact that the membership rejected the offer communicated to the company in a formal fashion? A. Yes.

Q. How and when?

A. I believe that was communicated by letter.

Q. Some time after the ballot? [155]

A. Yes.

Mr. Perkins: May I state that on respondent's case we intend to put in the exchange of correspondence between the parties that reflected the offer and the rejection.

Trial Examiner Miller: Very well.

The Witness: Shall I continue?

Trial Examiner Miller: Yes, discussing the situation of Mr. Pearson.

A. The negotiation meeting was held with company officials, and——

Q. (By Mr. Weil—interrupting): When was that held?

A. Here we go on dates again.

Q. I will bring you up to date with the company's note so that there won't be any question about it. Showing you this notation, would you read that, with particular attention to dates.

A. Yes.

Q. Does that refresh your recollection as to when this negotiating was done?

A. It does. The meeting was held, I believe, on February 6.

Q. What was taken up at this meeting?

(Testimony of Edward McElroy Gardiner.)

A. The prime problem was that of the discharge of Mr. Pearson. It was our contention that Mr. Pearson was conducting his activities as a member of SPEEA and had concerned himself with SPEEA activities in carrying this out, and that we felt that Mr. Pearson had been unjustly terminated. In addition, we stated that we felt [156] that there had been a misunderstanding occurring during the conference which resulted in the termination of Mr. Pearson. This misunderstanding, we believe, might have been unintentional, that is, Mr. Logan requesting this conference genuinely wanted to determine why Mr. Pearson had done what he had done. Mr. Pearson had in turn wished at this conference to have representatives from SPEEA with him, as he considered that the subject under discussion was to be that of concern to SPEEA and pertinent to SPEEA. Mr. Pearson in effect refused to discuss the situation without the presence of SPEEA representatives and Mr. Logan in this particular case restated that it appeared that he had felt that our presence was not required. On that basis——

Mr. Perkins (interrupting): I ask that that be stricken as hearsay. We already have had the direct testimony as to what occurred.

The Witness: I say that this was a statement by us, SPEEA.

Q. (By Trial Examiner Miller): At the February 6 conference? A. Yes.

Mr. Perkins: I will withdraw the objection.

A. On that basis it was arranged that a second

(Testimony of Edward McElroy Gardiner.)

conference be held, as it appeared that Mr. Logan had no objection to the attendance of the SPEEA representatives requested by Mr. Pearson, and this meeting was held shortly thereafter.

Mr. Weil: May we go off the record?

Trial Examiner Miller: Off the record. [157]

(Discussion off the record.)

Trial Examiner Miller: On the record.

Mr. Perkins: Mr. Weil, I don't mind if you want to put those in his hand.

Mr. Weil: He is doing pretty well without them.

Q. (By Mr. Weil): These are the notes of February 6 and following meetings concerning Mr. Pearson's discharge. If they will assist you, help yourself.

Trial Examiner Miller: The immediate question is, as I understand it, is the second meeting to consider Mr. Pearson's discharge, at which representatives of SPEEA were present.

Mr. Weil: That is right.

A. This meeting was held and Mr. Logan restated his questions to Mr. Pearson——

Trial Examiner Miller (interrupting): May we have the date?

A. This meeting is not in the notes.

Q. (By Mr. Weil): Which meeting are you referring to, a meeting held subsequent to February 6?

A. This was the meeting held subsequent to the negotiation meeting of February 6.

Q. But prior to the meeting of March 5?

(Testimony of Edward McElroy Gardiner.)

A. Yes.

Q. (By Trial Examiner Miller): There is in evidence now, Mr. Gardiner, a letter restating the company's position with respect [158] to Mr. Pearson, dated, I believe, February 11. Are you in a position to say at this time whether the second meeting which you are now testifying about in which Mr. Logan restated his questions was held before or after the February 11 letter?

A. It is my opinion that the meeting was held before.

Trial Examiner Miller: Very well.

A. In fact, I believe the meeting was held within a day or so following the negotiation meeting.

Trial Examiner Miller: Proceed with your description of the events of this meeting where Mr. Logan restated the company's position.

A. Mr. Logan restated the company's position, and the company—and also stated the company's opinion concerning the propriety of Mr. Pearson's actions. Mr. Pearson answered and stated what he considered to be his point of view concerning the propriety and the ethics of his actions. A general discussion followed and Mr. Logan stated that he would supply us the written—with the letter stating the company opinion and stand on this matter.

Q. (By Mr. Weil): Were there any other meeting that concerned themselves with the discharge of Mr. Pearson? A. Yes.

Q. When was the next meeting of that nature?

(Testimony of Edward McElroy Gardiner.)

A. As I see these notes here, I believe this was March 5, though I believe that it would be proper to note at this time that in the interim the SPEEA organization had notified the [159] company that they could not be, they would not agree to any contract between the company and SPEEA until Mr. Pearson's case was clarified.

Mr. Perkins (interrupting): I have a copy of that letter here. Do you recall the date of that?

The Witness: No, sir.

Mr. Weil: I believe that that was the letter of February 13.

Mr. Perkins: Yes, I just turned to it here.

Q. (By Mr. Weil): Is this a copy of the letter to which you had reference? A. Yes, sir.

Q. I think it might we well—can you explain interlineations that appear on the letter?

A. Yes. Those were inserted and initialed by myself because of the——

Mr. Perkins (interrupting): I am willing to stipulate those those were on the letter as the company received them.

Trial Examiner Miller: Very well. The stipulation is noted for the record.

Mr. Weil: Would you mark this as General Counsel's Exhibit No. 16 for identification?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 16 for identification.) [160]

Mr. Weil: I would like to offer that.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: Is there any objection to the receipt in evidence of General Counsel's Exhibit No. 16?

Mr. Perkins: Respondent has no objection.

Trial Examiner Miller: Very well. On the basis of the understanding expressed off the record while the reporter was marking the exhibit, it is understood that these are copies of the original letters and that there is no objection to the receipt in evidence of copies. With that understanding there being no objection, Counsel's Exhibit No. 16 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 16 for identification, was received in evidence.)

[See page 512.]

Q. (By Mr. Weil): What took place after that?

A. A letter was received from the company.

Q. Is this (indicating) the letter to which you have reference? A. Yes.

Mr. Weil: Would you mark that as General Counsel's Exhibit No. 17 for identification, please.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 17 for identification.)

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Mr. Weil: I would like to offer this letter of March 2. [161]

Trial Examiner Miller: Is there any objection

(Testimony of Edward McElroy Gardiner.)

to the receipt in evidence of General Counsel's Exhibit No. 17, a company letter to the SPEEA organization dated March 2?

Mr. Perkins: No objection.

Trial Examiner Miller: There being no objection, Counsel's Exhibit No. 17 will be received.

(The document heretofore marked General Counsel's Exhibit No. 17 for identification, was received in evidence.)

[See page 514.]

Mr. Weil: Would you go on?

A. This letter contained the statement that the company would re-employ Mr. Pearson. Following that a meeting was called by SPEEA with Boeing Airplane Company to discuss the situation and the best means of effecting, the most proper means of effecting, his re-employment. This meeting was held March 5. An understanding was reached during that meeting as to the means by which Mr. Pearson would be employed and the company's position was stated as to their views on the propriety and ethics of the MAC activity in general, and, in addition, their views concerning Mr. Pearson individually. SPEEA stated that it felt that Mr. Pearson's future would be damaged if allegations were made in references which would undoubtedly be requested of the company in case he requested employment elsewhere. The company stated that requests for references would be answered only to the extent of Mr. Pearson's technical proficiency and that they did not feel that such would be the case. [162]

(Testimony of Edward McElroy Gardiner.)

Mr. Perkins: I didn't understand what you meant by that, Mr. Gardiner, just the last phrase.

The Witness: All right.

Mr. Perkins: May we hear the last phrase?

(The latter part of the last statement was read as follows:

"The company stated that requests for references would be answered only to the extent of Mr. Pearson's technical proficiency and that they did not feel that such would be the case.")

Q. (By Trial Examiner Miller): Would you explain the last part of that answer, Mr. Gardiner?

A. The "such" in this particular case referred to the damaging of his future.

Mr. Perkins: I understand.

A. The company also stated in this meeting that their decision to re-employ Mr. Pearson did not indicate an alteration of their basic views toward the MAC itself. It felt that the re-employment of Mr. Pearson would result in the removal of a stumbling block to the negotiations affecting the SPEEA and the company.

Q. (By Mr. Weil): Mr. Gardiner, what was the condition of the MAC at this time, March 5, I believe it was?

A. At that particular time the deadline for the return to the invitations had been passed, and in view of the returns received it had been decided by SPEEA to cancel the present plans for the MAC.

Q. Was that decision on the part of the Exec-

(Testimony of Edward McElroy Gardiner.)

utive Committee, [163] that part of that decision which was on the part of the Executive Committee, a decision that the MAC would no longer be considered by SPEEA in any respect, or simply that at that time it would not——

A. Absolutely not. The decision was made simply to cancel this particular MAC convention, I will say. The SPEEA considers organized employment have——

Mr. Perkins (interrupting): May I ask that this be stricken, please?

Trial Examiner Miller: It begins to sound like a statement of position rather than a statement that occurred at that time.

Does that complete your recital of the events that occurred at this meeting when the company set forth at length its position with respect to the re-employment of Mr. Pearson?

The Witness: There is one last item that I would like to state, if I may.

Trial Examiner Miller: If you would.

A. And that is that the SPEEA requested that there be some way in which a discussion of proposed conduct on the part of SPEEA could be discussed with the company relative to the institution of conduct.

So that an indication of the company's stand against such conduct could be made evident, the company replied that it was their opinion that this would probably be illegal, and that it was their stand that they considered it best to wait until such

(Testimony of Edward McElroy Gardiner.)

[164] conduct had been instituted and then take whatever action in the light of their knowledge of the subject and all other conditions, to take what action appeared proper and usual.

Trial Examiner Miller: Does that complete your recital of the substance of this particular meeting?

The Witness: That is right.

Trial Examiner Miller: At this time we will recess until 1:30 this afternoon.

(Whereupon, a recess was taken until 1:30 o'clock p.m.) [165]

After Recess—1:30 p.m.

Trial Examiner Miller: The hearing will be in order.

Mr. Weil: Mr. Gardiner, will you take the stand again, please.

EDWARD McELROY GARDINER

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Weil): Mr. Gardiner, to go back to the question of the invitation to participate in the MAC, I believe there is a latent ambiguity in your testimony concerning what engineers were invited to participate in the MAC. Would you go over that?

Mr. Perkins: I didn't know of any invitation to any engineers.

Mr. Weil: Not the invitation, as far as that

(Testimony of Edward McElroy Gardiner.)

questionnaire was sent out to engineers that asked these questions, will you participate, and so forth.

Mr. Holman: You mean the poll?

Mr. Weil: Yes, the poll.

Trial Examiner Miller: The normal ballot.

Mr. Weil: The normal ballot of the engineers whether they wished to participate.

Mr. Perkins: May I hear the question as rephrased?

Q. (By Mr. Weil): In regard to the original ballot or poll of engineers questioning what engineers would be interested in participating in the MAC, it appears to me that there may be a [166] latent ambiguity in the record as to what engineers were polled, and I wish that you would clear that up and explain who were polled.

A. I see. All engineers of the SPEEA organization were polled, with the exception of those engineers working for Continental Can Company under contract at that particular time. In other words, the engineers polled and those whom we would consider as being called for the attendance at the MAC included those in Boeing Airplane Company or out of Boeing Airplane Company, who at that particular time would not be disqualified by virtue of some contractual obligation which would preclude their attending such a conference. This then would include men working for Boeing, who were members of SPEEA, men who are members of SPEEA, who no longer were working for Boeing or who were working elsewhere, but would not in-

(Testimony of Edward McElroy Gardiner.)

clude those for whom we had negotiated contracts which possibly would preclude their attending such a conference.

Q. Another matter which concerns me, in the joint conference about which you testified earlier, which took place around the 9th, I think, of February, somewhere around that time concerning Mr. Pearson's discharge, the conference at which Mr. Pearson attended, was any mention made by Mr. Logan in that conference of the possible damage to the Boeing Airplane Company which might or had resulted from the action taken towards MAC?

A. Yes. Mr. Logan mentioned that it was the company's opinion that they had suffered damage and he held up a sheaf of papers [167] which he stated were correspondence from other companies or other organizations expressing—I will use a term that is my own in this case—I don't consider it a direct quote—concern over the MAC, and to this extent, he stated in effect that damage had accrued to the company.

Mr. Perkins: What was the date of this? Is the record clear on that?

Trial Examiner Miller: The conference of February 9.

Q. (By Mr. Weil): When did you cease to be the chairman of the Executive Committee?

A. In March, 1953.

Q. When in March?

A. It would be, I think, at the time the new Executive Committeemen were voted in, but I be-

(Testimony of Edward McElroy Gardiner.)

lieve it was very close to the first of March. This official transfer took place at the monthly meeting of March.

Q. Which, according to previous testimony, would have been the second Monday of March?

A. It should have been, yes.

Mr. Weil: I think that is all.

Trial Examiner Miller: Mr. Cluck.

Mr. Cluck: I have no questions.

Mr. Holman: Mr. Examiner, I wonder if at this time I may ask for a recess of about a minute so that I may get the minutes of SPEEA which we have subpoenaed. I would like to put some [168] indices in them to save time in my examination.

Trial Examiner Miller: We will recess for whatever period of time is required.

(Short recess.)

Trila Examiner Miller: The hearing will be in order.

Cross Examination

Q. (By Mr. Holman): Mr. Gardiner, in order to clarify my view as to when you first entered SPEEA, would you please state that for me once more, when you first joined SPEEA?

A. Well, I believe the court records are available on that.

Q. Was it about 1949?

A. I believe so, yes.

Q. You have been in SPEEA ever since then, I take it?

(Testimony of Edward McElroy Gardiner.)

A. That is right.

Q. When did you first hold any office in SPEEA? I am speaking now of any committee assignment or assignments of the Executive Committee.

A. Well, my first assignment was the Executive Committee, which I believe was in December of '50 or January of '51. It was back in that particular time, and my services before that time had gone on for the preceding half or three-quarters of a year more or less on committees.

Q. I see. So you became a member of the Executive Committee in December or January 1951?

A. That is right. [169]

Q. You were on the Executive Committee as such as a member until—when was the time you were made chairman?

A. Well, I was made chairman pro-tem, I believe it was, in November of '51, and at the time, at this particular time, I ran for office again, and following that election I was elected as chairman.

Q. As member of the Executive Committee now you were on the governing body of SPEEA, is that true?

A. That is true.

Q. They were charged with the responsibility for negotiating for SPEEA and also operating the club organization, is that correct?

A. That is right, excepting in those areas which have been specifically limited in the constitution the

(Testimony of Edward McElroy Gardiner.)

SPEEA Executive Committee has the authority and responsibility.

Q. But as between the members of your group, they were responsible to your group, is that correct, that is, the people.

A. Could you rephrase that?

Q. The people who were on the varying committees doing work for SPEEA were under your general surveillance and approval of the Executive Committee? A. Not entirely.

Q. What do you mean by that?

A. There are certain committees which are responsible directly to the membership. For instance, the Tellers Committee is one [170] who does not report to the Executive Committee but to the membership.

Q. What other committee?

A. I was trying to think of the name of it. The Auditing Committee.

Q. Are there any other committees other than that?

A. Not that I can recall. We consider that committees appointed by the Executive Committee can tender a report for approval to the general membership.

Q. Are you advised of those reports?

A. It is the purpose of the organization that we be advised.

Q. As far as you know, you are advised of the reports? A. Not always.

(Testimony of Edward McElroy Gardiner.)

Q. Is it standard procedure not to be advised of the report?

A. It is the standard procedure to be advised. I am just indicating that not in all cases, but in some cases some things slip through.

Q. Surely. Of those committees, in your organization one is the Action Committee, I believe, is that correct? A. That is correct.

Q. That was formed back in about the fall of 1951, was it? A. Yes.

Q. That was formed for the purpose of reviewing various methods and actions which could be taken with respect to bringing pressure on the Boeing Airplane Company in its negotiations with SPEEA, is that correct? [171]

A. Should it be necessary, that is right.

Q. Should it be necessary?

A. That is right. It is the Planning Committee only. It is considered as a planning committee only.

Q. I see. You were advised from time to time of the planning done by that Action Committee, were you?

A. That is right. The committee in 1951 made one report.

Q. And this Action Committee was formed in 1951 because they felt that the company and SPEEA were not getting together on a contract?

A. No.

Q. Why was it formed?

A. The committee was formed because it was considered that there was a possibility that and

(Testimony of Edward McElroy Gardiner.)

SPEEA and Boeing would not get together on a contract.

Q. Mr. Gene Williams was chairman of that committee, is that correct? A. Yes.

Q. You were aware, I take it, of the activities of the Action Committee?

A. As given by the single report given to the membership.

Q. That would be a membership meeting, would it?

A. A special membership meeting, that is right.

Q. You had been familiar with the reports given to the membership at the membership meeting by the Action Committee? [172] A. Yes.

Q. Calling your attention to the meeting in June 1952 of the membership, is it not a fact that at that time the Action Committee proposed to the Membership Committee a plan, to the membership, a plan of suggested activities which SPEEA could take against the company? A. Yes.

Q. Is it not a fact that one of the suggested plans of action suggested was the Manpower Availability Conference? A. Yes.

Q. There were also other suggested plans, were there not? A. Yes.

Q. Those included the failure to punch time clock?

A. I don't know. I would have to check that.

Q. We will refresh your memory.

Mr. Weil: Mr. Examiner, I would like to object to that question until—any questioning concerning

(Testimony of Edward McElroy Gardiner.)

actions that were not taken. It seems to me they have no pertinency to the matter under consideration here.

Mr. Holman: Mr. Examiner, I think they do.

Mr. Perkins: The Trial Examiner has previously ruled on the same point.

Trial Examiner Miller: No, not on the particular point with relation to examination as to other types of action proposed by the Action Committee.

Mr. Holman: I would like to point this out. It's been presented here that the Manpower Availability Conference was not necessarily an oppressive action to be taken against the company but simply a form of device used by which engineers could use the Manpower Availability Conference as something of a placement bureau for engineers. And we are by this line of questioning seeking to show that this was just one of a number of allied plans of activity which SPEEA was to engage in, whose sole purpose it was to bring pressure on the company to accede to SPEEA's demand, and this Manpower Availability Conference is one of a line of suggested actions which SPEEA was urged to take, and this goes to question of whether SPEEA intended Manpower Availability Conference solely as a punitive measure or whether as alleged by the other side, that it was possibly a punitive measure, but it was also a sort of a market place or placement bureau for engineering, and that is the purpose of this line of questioning.

Trial Examiner Miller: Objection overruled.

(Testimony of Edward McElroy Gardiner.)

Q. (By Mr. Holman): Calling your attention, Mr. Gardiner, to what purports to be the minutes for the Executive—excuse me—minutes of monthly meeting of June 1952, in which it is stated, "Further move that the committee take under serious advisement the report submitted last September by the committee headed by Gene Williams, by John Lomax, and seconded by Harry Goldie", does that serve to refresh your memory as to the various considerations that were taken under advisement?

A. Yes.

Q. And it states here, does it not, "No overtime refusal to work?" A. Yes.

Q. And Manpower Availability Conference?

A. Yes.

Q. And publication to schools? A. Yes.

Q. And hit and run work stoppages?

A. Yes.

Q. And medical and dental appointments?

A. Yes, sir.

Q. And SPEEA to work, to meet during working hours? A. Yes.

Q. Would you explain to the Examiner, and I wish to be fair on this because this is very abbreviated, explain to the Examiner what these items mean. Let's take the medical and dental appointments.

A. I want to make one statement in this particular case, and that is, as I believe the minutes will show, the Executive Committee expressed its viewpoint that this report was not approved by the

(Testimony of Edward McElroy Gardiner.)

Executive Committee but merely submitted, and, therefore, in the statements that I will be making, I will be stating what it is believed to have been the Action Committee's purposes beyond in writing these items, in preparing these items——

Mr. Tillman (interrupting): I object, then, to any questions [175] of this type, as to what the Action Committee intended.

Mr. Holman: I think this goes to the same point as to the type of thing that is being intended, and it goes to the Manpower Availability Conference.

Mr. Tillman: That witness was not on the Action Committee.

Mr. Holman: He was on the Executive Committee, and this was referred to him as the governing body of SPEEA.

Trial Examiner Miller: The witness has indicated that the report was not approved. However, I assume from your testimony, Mr. Gardiner, that you were present and heard the report.

The Witness: That is correct.

Trial Examiner Miller: The discussions on the report, but not the report.

The Witness: That is right.

Trial Examiner Miller: Objection overruled.

Q. (By Mr. Holman): Taking the medical and dental appointments, was it the intention of the SPEEA members to have certain medical and dental appointments during their working hours which they had to go to instead of work?

A. May I express it my own way?

(Testimony of Edward McElroy Gardiner.)

Q. Sure.

A. From the discussion held I gathered that it was the intention as a proposed action that all members of SPEEA have a dental appointment at a given time. That would be a simultaneous medical or dental appointment. [176]

Q. And the publication to the schools, what would that involve?

A. Publication to the schools, if once again I recall the purpose at that particular time, was to advise schools of the presence of a labor dispute between SPEEA engineers and Boeing management, in order that they might not come to work with Boeing under the misapprehension of labor relations.

Q. No overtime was—refusal to work any overtime on the part of SPEEA, is that correct?

A. That is correct.

Q. And the hit and run work stoppage would be work stoppage in a sporadic nature?

A. That is correct; either sporadic in time or sporadic in terms of departmental.

Q. All these were designed to put pressure on the company, isn't that correct?

A. These are all designed as forceful action, that is right.

Q. This Action Committee was activated in August, was it not, to go ahead with some of these lines of action? A. No.

Q. The Action Committee was activated before August. The Action Committee was a planning com-

(Testimony of Edward McElroy Gardiner.)

mittee. These plans of action by the Action Committee were publicized in your newspaper?

A. Yes.

Q. Calling your attention to what has been identified by Mr. Pearson as proposal for SPEEA's plan of action, signed by the [177] Action Committee, are you familiar with that document?

A. Yes.

Q. You have seen that, haven't you?

A. Yes. This doesn't mean that I can recall it all.

Q. Surely. But you are familiar with that document as produced by the Action Committee and the date is 8/19/1952? That would be August 19, 1952?

A. I would have to pick them off, but I assume that it is.

Q. Reading to you the preface to the proposal for SPEEA's plan of action, in which is stated 'There is no real reason to expect the company's offer to improve materially unless some real pressure is exerted on it. Your Action Committee feels that this pressure must be applied some time, and it might as well be this year. However, Boeing engineers, in general, see no issues worthy of a walkout. 'What then,' is the question so often asked, 'can we do to force Boeing to grant concessions without resorting to a walkout?' The following pages present your Action Committee's draft of a sample plan which would be very likely to produce startling results without one day's absence from

(Testimony of Edward McElroy Gardiner.)

work.' Having read that excerpt, will you state whether or not that was your understanding of this particular document when it came to your attention on the Executive Committee.

A. That it was a draft?

Q. That was the thinking of the Action Committee, was it?

A. Yes. This plan also had not been approved by the Executive [178] Committee in its draft form and also the membership at a quorum meeting directed the Executive Committee to publish this draft.

Q. One of the plans of action suggested by this draft is the Manpower Availability Conference, is it not? A. Yes.

Q. And another activity was stop punching time clocks? A. Yes.

Q. You have made reference to sending publications to colleges as one of the projective plans of action. Is that what is referred to here as "neutralizing the hiring campaign?"

A. That, I believe, is the understanding of the committee, the Action Committee.

Q. Reading from the paragraph which refers to the neutralizing the hiring campaign, it states, "All forms of publicity, such as advertisements in trade magazines, technical publications, and newspapers, news articles clearly defining the situation at Boeing submitted to all media, letters to college and university placement bureaus, letters to high schools and articles in teaching journals to point up those

(Testimony of Edward McElroy Gardiner.)

aspects of Boeing's policies toward engineers which cannot stand public scrutiny. Inasmuch as new hires can obtain practically the same offer from any company if they make the effort, even the small deterrent offered by knowledge of the sources of discontent at Boeing will probably be sufficient to cause them to go elsewhere. Especially vulnerable are the programs of hiring college professors and undergraduates for the [179] purpose of stimulating engineering employment in the future. Meetings with these people in which the disadvantages of employment at Boeing are carefully and forcefully spelled out should do much toward neutralizing this costly program." That is the projected form of activity which is referred to here as your understanding of neutralizing the hiring campaign?

A. That is the understanding of the Action Committee in preparing it, as I understand it.

Mr. Tillman: I move to strike the question and the answer.

Trial Examiner Miller: Overruled.

Q. (By Mr. Holman): Calling your attention to what has been admitted as General Counsel's Exhibit No. 2, you are familiar with this document, are you? A. Yes.

Q. Calling your attention to the statement here, "As a point of interest, however, several companies have been sounded out, and they all have indicated unofficially that they desire to be included". Would you be able to tell us what companies have been sounded out in that respect? A. No.

(Testimony of Edward McElroy Gardiner.)

Q. This was never discussed with you?

A. That is right.

Q. You didn't discuss this with the Action Committee? A. No.

Q. If the company had been able to get together with SPEEA on [180] a contract this conference would have been called off, would it not?

A. Yes, with one understanding, if the company and SPEEA had agreed to a contract which contained provisions as they stood up to the anniversary of the contract, the broad implications of the contract concerning slow downs were such that we felt that the Manpower Availability Conference could possibly be construed as falling outside the realm of the contract, and for that reason we would not have held it.

Mr. Perkins: I am not quite clear on that one. Could we have the answer? I don't want to interject here, but I am just suggesting that the answer be repeated, and then Mr. Gardiner explain a little bit more fully what he means.

Trial Examiner Miller: Let the record be read.

(Answer read.)

Q. (By Trial Examiner Miller): Can you explain your response, Mr. Gardiner?

A. Surely. We would not and did not intend to hold the MAC during the period of the last contract with the company. This was for the reason that we felt that one term in the contract concerning strike slowdowns, sit-downs, et cetera, was so stated in broad enough terms, such that a MAC

(Testimony of Edward McElroy Gardiner.)

convention, the MAC, could be considered to some extent as a slow-down. Therefore, if a contract exists written in that phraseology we would not have held a MAC. [181]

Mr. Perkins: If I may be permitted just to ask, does the Examiner object to my asking just two or three questions for the purpose of clarification? I realize that it is a very desirable practice to confine cross examination to one counsel on each side of the table, but I would like to have the Trial Examiner express himself on that.

Trial Examiner Miller: I would normally request that that procedure be followed, however, since a rather special situation appears to have arisen, and there is no indication that we are letting down the bars, you may proceed at this time.

Q. (By Mr. Perkins): I understood the substance of a previous question to be, if you had consummated a contract with the respondent prior to the date for the Manpower Availability Conference that you would have called off the conference. Am I correct in my recollection?

A. We would not have held the conference.

Q. And then do you mean by the next answer that you would have asked that any new contract contain an approbation of the Manpower Availability Conference as a condition precedent to your agreeing to the terms of a new contract?

A. No. That is one part of the answer. Either we have formed a satisfactory contract with the company in which we feel that the advantages ac-

(Testimony of Edward McElroy Gardiner.)

cruing from that contract are greater to the membership than the disadvantage of not being able to hold such a MAC for all the reasons previously submitted, the purposes of [182] holding such a Manpower Availability Conference.

Q. But you would have insisted upon one or the other?

A. Let us say that that would be in our power to determine. And we would so determine whether it was more advantageous to the membership to sign a contract which we felt would not allow us to hold a MAC in return for other advantages, or the inclusion in the contract phraseology which would permit us to hold the MAC.

Q. You mean before you would have approved a contract with the company you would have insisted either that your economic demands be met or that approbation of the Manpower Availability Conference be written in the contract?

A. Not at all.

Q. I am not trying to confuse you, I assure you. I am trying to get an explanation of what you meant by the other remark.

A. I mean in our evaluation of the offer from the company, an offer, we would have—we would decide at that time whether it was better to sign a contract which would not permit us to hold a MAC in our own opinion, or insist that inclusion be made in the contract which would permit us to do so. I am not saying that all of your demands have to be met, because contracts are finally deter-

(Testimony of Edward McElroy Gardiner.)

mined by compromise and it is a relative matter, and it is one that we have to determine at the time of the contract, the time the contract is agreed on.

Mr. Perkins: I don't intend to pursue these questions any further, Mr. Examiner. [183]

Q. (By Mr. Holman): Mr. Gardiner, in the fall of 1952, you, I believe, testified that you would delay for four weeks the activation of the Manpower Availability Conference until the next meeting, or until the next meeting of the company and the SPEEA, is that correct?

A. The last part of the question I—we stated to the company that in view of the fact that satisfactory negotiations seemed to be occurring, it was our intention to take no overt action on the Manpower Availability Conference for at least four weeks.

Q. At the time those negotiations were going on you did not ask for the Manpower Availability Conference to be put into the contract, did you, at that time?

A. I will have to rely on my memory in that particular case there as to time going on there. I don't believe it was requested during that time.

Q. These actions, including the Manpower Availability Conference, and the refusal to punch time clocks, and these other plans of action which were set forth in the plan of the Action Committee, were all designed to bring pressure on the company without the necessity for a full strike, isn't that correct?

(Testimony of Edward McElroy Gardiner.)

A. Without the necessity for a full strike, you say?

Q. Rather than going out on strike, everybody leaving their jobs?

A. I would say these have been considered as an alternative or as an adjunct to the strike. [184]

Q. If these didn't succeed, you would consider going out on a strike?

A. Or possibly the reverse.

Q. Possibly the reverse? Isn't it a fact that in an executive meeting as late as January 1953, a question of whether the strike should be submitted to the membership was brought up before the Executive Committee and that it was moved that the question of a strike not be submitted to the membership, and that that motion was passed?

A. I believe that to be correct, and if you have the minutes, I can check on that.

Q. Calling your attention to what is here indicated as the minutes of the Executive Committee meeting of January 14, 1953, Hendricks moved to reconsider the full questionnaire, four against two; E.M.G. appealing intent of poll that it should include a strike vote; against, four; for, two. Does that refresh your memory?

A. That refreshes my memory concerning that particular meeting.

Q. There was a question of whether a strike should be submitted to membership.

A. As considered in the meeting of January 14. My reason for answering in that manner is that I

(Testimony of Edward McElroy Gardiner.)

believe there was a preceding meeting in which a vote was made.

Q. A vote was made to—— [185]

A. (Interrupting): In which a strike ballot was to be included.

Q. Explain your answer.

A. May I have the minutes?

Q. Surely.

A. For the year 1952, I have one indication here given in the minutes of a special membership meeting dated November 24 in which the Executive Committee's recommendations concerning the company's offer were that as a result of the "majority report that SPEEA must consider appropriate action such as demonstration, walk-out, MAC suggested as means of showing protest."

Q. That "demonstration walk-out" would be for a day or something like that?

A. That is right.

Q. That is what you referred to as similar to a hit and run stoppage, is that correct?

A. No, not analogous in its entirety.

Q. What was that?

A. A demonstration walk-out in this particular case is one in which a specific time of walk-out is indicated.

Q. That is similar, then, to everybody having a dental appointment at the same time, is that correct?

A. It might be so interpreted. Though, the demonstration walk-out as the members of SPEEA

(Testimony of Edward McElroy Gardiner.)

viewed it was one in which the members in the in the SPEEA classification who were non-exempt, and thereby in leaving the company must punch out, would not have [186] received pay from the company for the period involved in the walk-out. And opinions were exchanged as to the means in which members in the exempt category which must by law be paid for this particular period, means were considered of a manner in which recompense could be made to the company for the time not worked but paid. You see there is a difference in that particular case. A dental appointment might be construed as a legitimate excuse, and this was——

Q. This was an illegitimate excuse?

A. No.

Q. What is the distinction? Both of them are planned, are they not?

A. The dental walk-out, if we want to use the term to describe it, was merely a proposal and it was never one that secured the approval of the Executive Committee.

Q. I see. You were interviewed, were you not, by the Post-Intelligencer in January of this year with respect to the labor negotiations and discontent there between SPEEA and Boeing?

A. Yes.

Q. Reading from what purports to be an excerpt of the Post-Intelligencer for January 6, 195? it is stated, "The Union now is polling members to de-

(Testimony of Edward McElroy Gardiner.)

termine what minimum increase will be accepted, and Union Chairman M. E. Gardiner said they described the minimum offer poll as a strike vote, in essence."

Continuing the quote: "He emphasized the engineers will [187] take all other steps possible before undertaking a walk-out".

Does that state, in substance, what you reported to the newspaper?

A. I don't consider it as such. Now, the quotation section of this, "a strike vote in essence", I believe refers to one poll on the questionnaire which was distributed and then recalled.

Q. You deny that is the purport of your——

A. (Interrupting) I believe this quote that has been made has been lifted out of context and gives a faulty impression, as is many of the publications.

Q. You were also interviewed by Dick Ross, were you not, on or about January 2, 1953?

A. That is right.

Q. On television, and in answer to this question from Dick Ross, "Well, now, what is the next action on the part of your association?" E. M. Gardiner, you are reported to have stated, "We are at this time conducting a poll of our members which should be returned by the end of this month, to allow them to determine whether they should perhaps leave this area or carry on eventually a strike in order to enforce our particular feelings on this issue." Is that a correct statement of what you said, in substance? A. I believe so.

(Testimony of Edward McElroy Gardiner.)

Q. This was before the meeting of the Executive Committee [188] during which the motion to include the strike vote was voted down, is that correct?

A. That is right. In other words, the poll referred to in this particular case is the poll that was recalled on the basis to us of ambiguity, and a second vote was taken by the new Executive Committee which resulted in a decision at that time to not include the strike ballot as part of the poll.

You recognize that this is the chronology of the events.

The Executive Committee voted at one time to submit a poll which did include opinion concerning a strike. This poll was recalled, and the difficulty was of the ambiguity in the poll. We found it very difficult to interpret just what the membership meant by their voting. A second poll was prepared, the new Executive Committee was in attendance and voted on the issues of that poll. At that particular meeting the decision was made by a majority vote to not include the strike issue as a part of the poll.

Q. You dissented in that vote, is that correct, you and Mr. Czarnecki?

Mr. Tillman: I object to the question.

Trial Examiner Miller: I will sustain the objection as to the witness's personal position on the matter unless his personal position is shown to be material.

Mr. Holman: I think it is material, Mr. Exam-

(Testimony of Edward McElroy Gardiner.)

iner, in this respect, and that is it bears upon the question of whether this [189] witness and those on the Executive Committee at the time these actions were planned represented the feeling of the majority of the SPEEA organization.

It is important to show that the thinking of this witness and others in the organization was not reflected, and thereafter other members who felt that some of these actions taken by SPEEA were not for the welfare of SPEEA were elected to office and succeeded them.

In other words, we are pointing out that Mr. Gardiner represents a school of thought in SPEEA which produced these plans of action, which were not approved of by the regular membership.

Mr. Perkins: May we consult for a minute?

Trial Examiner Miller: Very well. Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

At this time I will sustain the objection.

Q. (By Mr. Holman): I believe you testified, Mr. Gardiner, that the overwhelming majority of SPEEA voted to go ahead with the MAC sometime in November. I believe it was November 24, is that correct?

A. I don't recall the timing on that particular one.

Q. At a meeting in that month or near that month, the whole membership was given a chance to

(Testimony of Edward McElroy Gardiner.)

vote on whether the SPEEA organization should now go ahead with MAC, is that correct?

A. No. The vote was taken that a MAC should be conducted at a [190] time to be determined by the Executive Committee.

Q. But that vote was that the MAC should be activated and this was after the four-week delay, was it?

A. That was during the four-week delay, to the best of my memory.

Q. Do you have any record of the size of the majority which passed that motion?

A. No, I don't have any personal recollection. If it isn't in the minutes, I am afraid it isn't available.

Q. You don't recall how many people were at the meeting?

A. No. I believe that that information might be available in the Membership minutes, general membership minutes. But you must recognize that in regular membership meetings that a vote can be taken either by a show of hands or by a standing vote. If a clear cut majority is shown, there is no roll call taken.

Q. In other words, you, yourself, as of right now don't recall what the majority would be?

A. No. This issue has been raised in several meetings, and so I wouldn't wish to rely on my memory on that issue.

Q. You couldn't estimate how many were there?

A. No.

(Testimony of Edward McElroy Gardiner.)

Q. Did you notice if the attendance was indicated?

A. I have looked through the file here. I don't seem to recall the November 24 meeting. I don't seem to find it in here.

Q. The MAC was given publicity in your local newspaper, was it [191] not? A. Yes.

Q. What is the name of that newspaper?

A. The N.P.E.

Q. I wonder if we could have it spelled out?

A. The Northwest Professional Engineer.

Q. To whom was this distributed?

A. The newspaper is distributed to the membership. It is distributed at times to those within the SPEEA representative representation unit.

Q. What do you mean at times?

A. I mean by that that we have on file, on the basis of information supplied from Boeing Airplane Company and other companies, a list for whom we bargain. We separate these in two categories, members and non-members, determined mostly by income and expense we decide whether the distribution should be made only to members or to members and non-members. In addition, we distribute to a courtesy list which includes those members who leave our bargaining group by virtue of promotion or transfer into supervision and other supervisors, by virtue of a listing supplied to us by the Boeing Airplane Company. In addition, a final listing is made of distribution to other bargaining agencies with whom we correspond.

(Testimony of Edward McElroy Gardiner.)

Q. Are they sent outside of the city, when you say "other bargaining organizations"? [192]

A. Yes.

Q. They would be sent nation-wide, would they?

A. Yes.

Q. What was your part in the promotion of the MAC personally, that is?

A. I was Chairman of the Executive Committee.

Q. Did you take any action personally as to the setting up of the MAC or advising with the Action Committee?

A. No. That was the duty of the liaison officer to deal directly with the Action Committee. I also served as spokesman and, therefore, letters concerning the MAC which have been transmitted go over my signature. As an example, the letter to the Boeing Airplane Company concerning the invitation.

Q. The liaison officer, who is he, what is his name?

A. The liaison officer has changed—are you referring to the Action Committee or to the MAC Committee?

Q. Perhaps I am a little confused now. The MAC Committee was a part of the Action Committee, is that correct?

A. No. The way this happened is that the Action Committee was planned for planning purposes only, and those plans which were determined to be useful, or that should be processed further, resulted

(Testimony of Edward McElroy Gardiner.)

in the organization of other committees to take on those specific functions.

Q. The MAC Committee took on the special function of MAC?

A. That is right. [193]

Q. The only thing I am trying to determine now is who is this liaison officer that the Executive Committee worked through in contacting the MAC organization?

A. Good enough. I think I can clarify it in this way: In my belief Mr. Edwin Czarnecki was liaison officer for the Action Committee, the planning function, at the time that the MAC Committee was formed. It is my belief that Mr. Hendricks would near that time become a member of our Executive Committee and served as liaison officer.

Q. Was Mr. Czarnecki on the Executive Committee? A. Yes.

Q. Did he report to you, that is, the Executive Committee, from time to time as to the progress of the MAC?

A. The progress of the MAC planning, yes. You recognize he served as liaison officer for the Action Committee.

Q. Do you know Mr. Rick James?

A. Yes.

Q. Who is he?

A. He is head of the Publications Committee—pardon me—he is at present a member of the Executive Committee of SPEEA.

(Testimony of Edward McElroy Gardiner.)

Q. How long has he been a member of the Executive Committee?

A. Since March of this year.

Q. Did Mr. James have any position in the planning of the MAC?

A. Not to my knowledge. Mr. James was editor of the N.P.E., [194] and served as head of the Publications Committee.

Q. He—N.P.E. is the newspaper, I take it?

A. Northwest Professional Engineer.

Q. Just to summarize a little bit with respect to the area representatives, they were the representatives that the Executive Committee would contact on certain policy and business matters relating to SPEEA?

A. In an informal manner. In other words, I must state it in that way because the Executive Committee was finally determined by a clarification through a constitutional ballot as the sole authority and responsibility for the business of the SPEEA other than that specifically designated in the constitution.

Q. And the Executive Committee would send out notices to the area representatives called news letters, is that correct?

A. It could and did.

Q. And did. Do you happen to know whether such area news letters were sent to the Boeing Airplane Company? A. Yes.

Q. They were?

A. Yes. It was a matter of policy with the Ex-

(Testimony of Edward McElroy Gardiner.)

ecutive Committee from one to me onward to make sure that the company received the same information that our members did.

Trial Examiner Miller: If you are about to pass to a new subject, Mr. Holman, I think this might be a good place to recess for five minutes. [195]

(Short recess.)

Trial Examiner Miller: The hearing will be in order.

Q. (By Mr. Holman): Mr. Gardiner, why was the MAC considered an effective method of putting pressure on the Boeing Airplane Company, at least at the time that it was considered?

A. Considered by myself, do you mean?

Q. Yourself and the general organization, SPEEA organization.

A. I don't believe I can answer for the organization, excepting by a recall to the ballot which was conducted, but the response as shown by discussion in membership meetings, and that as indicated by discussion in the Executive Committee, and that which I, myself, have considered, are all different to a certain degree, and I would like you to ask me which one you would like me to go at.

Q. Where are they similar, let's ask that first? I assume you all have a similar view of the MAC?

A. Surely.

Q. What would that be?

A. It is similar in this regard: that it is the contention generally held by all SPEEA members that the termination rate of the Boeing Airplane Com-

(Testimony of Edward McElroy Gardiner.)

pany is a matter which is of serious consequences to both the SPEEA membership and the Boeing Airplane Company. This was brought out by Mr. Esary at the start of negotiations in which he stated, and I don't intend to quote him directly, that in his consideration a man should work under [196] conditions unless he finds either better conditions elsewhere or intolerable conditions where he is employed, at which time he should leave. This is the form of, you might say, a white or black decision, which is a supposed right of an individual working for an employer to have available to him at all times.

Mr. Perkins: Would you please mark that place in the record?

Q. (By Mr. Holman): You aren't referring to any notes there, are you?

A. No. It is just that you asked how did we—how did I consider and how does the membership consider an activity such as the MAC to be an effective agency.

Q. I am interested in knowing why you thought—perhaps I didn't phrase it too well—why you thought this form of pressure as opposed to other forms of pressure would be successful, what sort of damage that you thought this would be to the company to require them to meet your terms?

A. First of all, I don't believe it is necessary to do damage to someone else to bring about a condition where they must come to your terms.

Q. I am not speaking of physical damage. I am

(Testimony of Edward McElroy Gardiner.)

speaking of damage in the broad sense of pressure or to create an undesirable situation which the company would wish to avoid or do away with and, therefore, meet your demands. That is the sort of damage I am referring to. [197]

A. Once again I say that I believe that sometimes an ameliorating step or action can be taken unilaterally which will create conditions under which the company will recognize that a change should be made. I feel quite definitely a pressure need not be damaging.

Q. What sort of pressure is this?

A. This is the pressure of restored bargaining rights and data. We have considered termination data in these negotiations as most pertinent as an indication of the necessity that the company's wage scales and policies can stand revision to the gain of both.

Q. You mean, by "termination" you mean the termination of engineers in sufficient quantities so that the company could not operate, or at least operate under great difficulty without them, is that correct? A. That is correct.

Trial Examiner Miller: I am not quite sure that I so understood the witness's answer, because he indicates that——

Mr. Holman (interrupting): Let's get it straight. I don't want to put words in his mouth. I am trying to determine the type of pressure.

Trial Examiner Miller: Let the record be read

(Testimony of Edward McElroy Gardiner.)

as to the witness's previous response. I have an observation to make with respect to it.

(Record read.) [198]

Q. (By Trial Examiner Miller): Your previous response at some length has just been read. When you speak of termination data, in that connection are you referring to the rate of turnover of the company's engineers? A. That is right.

Q. The rate at which people leave Boeing's employ under normal circumstances?

A. Under all circumstances.

Q. Under circumstances in regular operation?

A. Correct.

Q. Will you explain for us the reference in that answer to the fact that in your opinion, or in the opinion of SPEEA members, the rate of turnover that has existed at Boeing among engineers is indicative of a need for the revision of the company's wage structure?

A. It is felt in certain regards there is an agreement between the expression made by Mr. Esary, that I have quoted, in which when a man finds a situation intolerable or finds a profit can be made elsewhere, that he should terminate. This, then, means the termination data in itself is a measure to all concerned as to the opportunities existing for the men in our bargaining unit elsewhere, to which they will respond, or also a measure of the intolerableness, to coin the term, of present conditions at Boeing.

Trial Examiner Miller: The witness's last re-

(Testimony of Edward McElroy Gardiner.)

sponse is [199] consistent with my earlier understanding.

Q. (By Mr. Holman): The thing I am trying to determine is whether the MAC was used to accelerate that turnover. Is that correct?

A. There is another thing that has occurred——

Mr. Perkins (interrupting): Can we have a responsive answer on that?

Q. (By Mr. Holman): Answer yes or no, and then qualify your answer. The question was, was this action of MAC designed to accelerate the turnover of engineers at Boeing? A. No.

Q. It was designed for that purpose?

A. No, it was not designed primarily to that end.

Q. You mean by "primarily" that it was in part designed for that purpose?

A. No. I mean that it was recognized that as a secondary aspect that that would occur. This is an opinion, and opinion only. We have no measure to indicate that the termination rate would accelerate as a result of the Manpower Availability Conference. This is based on the supposition that if the men in attending such a conference find conditions to be better at Boeing than elsewhere, there will be no terminations, and, in fact, there will be a cessation of the unrest felt by engineers under the present circumstances, which would benefit Boeing.

Q. Was it anticipated that this MAC was being held at a time [200] when engineers were in short supply?

(Testimony of Edward McElroy Gardiner.)

A. Would you repeat the question?

Q. At the time the MAC was to be held was it felt that engineers were in short supply the country over? A. Yes.

Q. That was a fact, I take it?

A. That was a fact.

Q. Still a fact?

A. That is right, to my belief.

Q. The MAC was not held, was it?

A. The MAC was not held.

Q. It was the opinion of the Executive Committee that one of the reasons why it was not successful was that it possibly violated business ethics, isn't that correct?

A. That was one expression of feeling. I can elaborate on that, if you wish.

Q. Calling your attention to what appears to be News Letter 52, that is a copy of a news letter sent out by the Executive Committee?

A. That is right.

Q. And calling your attention to the paragraph which reads, "The Manpower Availability Conference will not work as an employment means. The possible reasons which are apparent to the majority of the Executive Committee are three: one, participation in the conference may have been considered to violate [201] business ethics." Is that correct? Is that a correct statement?

Trial Examiner Miller: You mean by your question as to whether it is a correct statement as to

(Testimony of Edward McElroy Gardiner.)

whether that correctly reflects the Executive Committee's thinking?

Mr. Holman: I would like to know if I read it correctly, first.

Trial Examiner Miller: Very well.

A. With the indication that it was stated that such reasons were possible, the possible reasons are three, that is not an expression of certainty on the part of the Executive Committee but merely that the possibility exists.

Q. (By Mr. Holman): In addition, the Executive Committee also felt that the action had publicized to other companies the unrest among engineers which existed at Boeing Airplane Company?

A. Yes.

Q. Was it not also reported by the Executive Committee through its news letter with respect to the Manpower Availability Conference, "However, it is encouraging to see recent local newspaper advertisements for engineers by competitive industries, even a member of the A.I.A." Calling your attention to the portion that I have just read here, is that a statement of the feeling of the Executive Committee?

A. That is a statement of the Area Representative Committee, isn't it? [202]

Q. Yes. Is that also a statement of the Executive Committee? I mean was that also their feeling?

A. No.

Q. What is the Area Representative Committee?

A. Would you like the organization?

(Testimony of Edward McElroy Gardiner.)

Q. No, I just wanted to know for the purpose of clarification, because I would like to know whose statement this is.

A. Well, I believe this was covered in testimony.

Q. It very likely was. I just wanted to——

A. (Interrupting): I can't recall that. The Area Representative Committee is a Central Committee, and then has a distributive grouping below it to which information can be passed to individual area representatives for distribution throughout the membership, and this organization is also used for the collection of information, comments and opinions, which are then prepared and printed by the Area Representative Committee. That is the avowed function and the approval of the liaison officer of the executive Committee to which the area representative committee reports, is used only to check against libelous statements. In other words, printing of information signed by the Area Representative Committee does not necessarily mean that those views are agreed to by the Executive Committee.

Q. Is that area representative letter circulated to the membership?

A. Yes. SPEEA is a democratic organization and it feels that [203] the distribution of information is just as important, the distribution of dissent information is just as important as that of affirmative.

Q. This is considered dissent? A. No.

Q. You are not going to say that that is dissent information, or are you?

(Testimony of Edward McElroy Gardiner.)

A. No, I am not. I am just saying that the Executive Committee did not form an opinion.

Q. It has not necessarily been approved by the Executive Committee?

A. That is right, they have not said that that is bad, good, or proper or improper.

Q. You have heard of the "Hungry Hundred"?

A. Yes.

Q. What does that relate to?

A. The term "Hungry Hundred", as I gather it, refers to a group of men very loosely organized, who have assembled for the purpose of discussing problems which they consider to be of importance to SPEEA, and thereby to provide the grass roots organization, to use the term loosely, which can be used for initiating motions or discussions on the floor of regular membership meetings, or directing petitions to the Executive Committee.

Q. A kind of a club within a club, would that be it? [204]

Mr. Cluck: If the Examiner please, I object to this question and the line of inquiry as being immaterial to any issue of concerted activities or otherwise. It goes into the matter, presumably, of some intra-organizational policy forming, whereas a matter of concerted activity and the actions taken by the organization itself are all covered in the official minutes or other evidence. Opening up inquiry as to the "Hungry Hundred" or "Fullsome Forty" might take up a variety of organizational problems.

(Testimony of Edward McElroy Gardiner.)

It enlarges the inquiry here to no useful purpose that I can see.

Trial Examiner Miller: What is the materiality, Mr. Holman, of this exploration of factionalism within the organization?

Mr. Holman: It relates, Mr. Examiner, to the point previously brought out, that the factionalism within this group we will show has proceeded to an extent that the so-called "Hungry Hundred", is a group within SPEEA which is engaged in these various plans which we have just outlined, and which we submit does not have the whole-hearted approval of the total membership, it relates to the same issue which we discussed previously, I believe.

Mr. Tillman: In that event, the General Counsel joins in the objection of Mr. Cluck.

Trial Examiner Miller: I will sustain the objection. Off the record. [205]

(Discussion off the record.)

Trial Examiner Miller: On the record.

Q. (By Mr. Holman): Mr. Gardiner, with respect to your answer to my question as to whether the Manpower Availability Conference would be damaging to the company or not, is it your position that it would not be damaging providing the company met SPEEA's demands? In other words, are you taking the position that if the company had met SPEEA's demands, there would not be a MAC?

A. I would say it this way: That if the company had acceded to the first proposal made by SPEEA, that though the MAC could still have been of use,

(Testimony of Edward McElroy Gardiner.)

and these other uses we have expressed to the members of SPEEA, that the economic reasons in this particular case would not result in damage to the Boeing Airplane Company. The way you have stated your question I find it difficult to follow.

Q. All right. Let me ask you this: If the MAC were successful in luring away several hundred engineers from Boeing, would that be damaging in your estimation to the company?

Trial Examiner Miller: Just a moment. I am going to interpose a consideration at this point on my own initiative.

When this line was begun, it was begun with a question which sought to elicit those aspects of the witness's own opinion which coincided with the opinion of the Executive Committee and the majority of the SPEEA membership as he was aware by virtue [206] of his participation in SPEEA activity.

We are still proceeding within that frame of reference, seeking such aspects of the witness's opinion as he believes to coincide with the official opinion of SPEEA.

Mr. Holman: That is right.

Mr. Cluck: I object further to the form of the question. The question was if SPEEA was successful in luring away several hundred employees from the company, where the witness has made it clear that the purposes of SPEEA were other than that.

Mr. Perkins: I don't think the witness has made that clear at all, Mr. Examiner.

(Testimony of Edward McElroy Gardiner.)

Mr. Cluck: If he hasn't made that clear, it ought to be clear before——

Trial Examiner Miller (interrupting): I think I will permit that to stand. If the record and the question contain an incorrect assumption of the witness's position, he is fully capable of straightening it out. Go ahead.

Mr. Holman: Repeat the question?

Trial Examiner Miller: Yes, with the understanding that we have previously indicated, seeking those aspects of the witness's opinion which coincide, as he understands it, with the official opinion of SPEEA.

Q. (By Mr. Holman): Assuming that the result of the MAC would be to lure several hundred engineers from Boeing Airplane [207] Company, was it considered in the opinion of the Executive Committee and SPEEA generally that that would do damage to the Boeing Airplane Company?

A. This is a rephrasing of the question, because as I had stated beforehand, it was not considered an objective of the MAC to lure engineers away from Boeing. The purpose was to provide conditions of free bargaining so that the engineers might determine their true market value. This market value could be used as data in negotiations with the company to provide a fair measure or degree of the discrepancy existing between the condition of remuneration at Boeing and those of other concerns.

Q. Suppose it was determined that the data showed that Boeing was not competitive with the

(Testimony of Edward McElroy Gardiner.)

rest of the industry, would that do damage to Boeing in the opinion of SPEEA?

A. It would do damage to Boeing if, in the face of this evidence——

Q. (Interrupting): Boeing did not meet SPEEA's demands?

A. Did not propose changes which would ameliorate that condition. The reason I have stated it in that particular manner is that we don't insist that each demand by itself be acceded to. Our policy throughout these negotiations, and I hope it will continue to be, is that of stating a condition as we see it and proposing a solution, and trusting that negotiations will result in a solution which will cure the condition as we see it.

Mr. Holman: That is all I have, Mr. Examiner.

Trial Examiner Miller: Any redirect?

Mr. Weil: A few questions.

Redirect Examination

Q. (By Mr. Weil): Early in your cross-examination, Mr. Gardiner, respondent's counsel read to you from the report of the Action Committee dated 8/19/52. Mr. Holman read you a section from the portion of this document which is entitled "Plan of Action" which started out "neutralizing the hire campaign." He read you another section, that was the first of three items under that section, and he read you the third, "Stop punching time clocks". However, he omitted the second which I propose to read and perhaps you can tell me if that is the feel-

(Testimony of Edward McElroy Gardiner.)

ing of the group. "Two: To encourage engineers to seek more suitable employment elsewhere, a Manpower Availability Conference in which invitations are sent out to several thousand companies employing engineers to send representatives to Seattle at some designated date to interview dissatisfied engineers at Boeing's would have tremendous publicity possibilities as well as to provide a definite service to those engineers who are seeking other employment at that time. Even if such modest goals as 200 engineers pledging to attend such a conference, if only for the purpose of making it a success, and 15 companies responding were attained, such a plan would be considered a success."

Do you consider that that paragraph is also a statement of the thinking of the Action Committee?

A. Yes, quite definitely. I mean Mr. Holman presented one portion of that particular report, and I don't recall whether he stated that this was the sole purpose expressed by the Action Committee.

Trial Examiner Miller: He did not.

Mr. Holman: I did not. We have no objection to this going in.

The Witness: I see.

Q. (By Mr. Weil): You stated that a contract with Boeing would have possibly resulted in calling off the MAC. Was that true right up until the time that the MAC would have been run, or was there a period after which it would not have been run?

A. I believe that the proper term that I used, and I hope I was careful in phrasing this answer,

(Testimony of Edward McElroy Gardiner.)

was that a MAC would not have been called were the contract in existence, because there is one point that we considered important, and that is we recognize that a MAC would take a given length of time to run and should a sufficient reception be given to our invitation, we would be forced thereby to hold such a conference. We were morally obligated to do so. And that meant that if such a conference were held by virtue of reception to these invitations, we would have considered it impossible or improbable that we would have signed the contract with the company unless a specific release for this form of activity were a portion of the contract. So the answer is we would not have called such a conference had [210] there been a contract immediately in view, and it was on this reasoning that we did not start any steps which could be considered by us to be overt in starting the MAC until we felt that a definite impasse existed between Boeing and the SPEEA organization. You must recognize we didn't even allow a license to be applied for until we had by letter ballot determined that the SPEEA organization would refuse an offer made by the company in which the statement was made that this was their ultimate offer.

Q. Mr. Holman mentioned other plans of action under the MAC, it became apparent that other plans of action were considered by the Action Committee. Were any other plans of action which were presented by the Action Committee to the membership or to the Executive Committee ever consummated?

(Testimony of Edward McElroy Gardiner.)

A. The only one that I can recall is increase of publicity and education of the members. Possibly the record will, could, bring up others to my attention, but the——

Mr. Holman (interrupting): I wonder if it could be explained what the reference to the record means? You mean the record of this——

The Witness (interrupting): I'm sorry. The minutes of the Executive Committee meetings, regular membership meetings, news letters, or N.P.E.

Q. (By Mr. Weil): Specifically, were any of the plans of action under the heading of "Neutralizing the hire campaign" in this [211] report of 8/19/52 ever consummated?

A. May I see the recommendations?

Q. I will read them to recall them to you, if you wish.

A. There is one particular section that I would like to look at on that.

Q. "All forms of Publicity such as advertisements in trade magazines, technical publications and newspapers, news articles clearly defining the situation at Boeing submitted to all media, colleges and universities, placement bureaus, high schools, and articles in teaching journals to point up those aspects of Boeing's policies towards engineers which cannot stand public scrutiny."

Trial Examiner Miller: Your question is whether anything was done along those lines?

Q. (By Mr. Weil): Were any of those means consummated?

(Testimony of Edward McElroy Gardiner.)

A. Remembering that the Executive Committee did not approve the wording of this particular report in which the last sentence is the one to which I know the Executive Committee took exception, "which cannot stand public scrutiny", certain of those actions did take place, that is, there have been newspaper items which have appeared concerning the negotiations between Boeing and SPEEA. The words in there about letters written college placement bureaus, quite definitely in order to obtain information on the new hire rates for engineers. Reference was made to some of this material by Boeing Airplane Company, and in furtherance of this point, checks were made with the various college [212] placement bureaus in determining the new hire rates for engineers, and so I think I might say in summary that certain of the actions by themselves proposed by the Action Committee were actually consummated, but not necessarily with the purpose given by that Action Committee report.

Q. (By Trial Examiner Miller) : In other words, the purpose of neutralizing the hiring campaign——

A. (Interrupting) : That is right, has not been an official SPEEA pronouncement approved by a majority of the Executive Committee.

Mr. Perkins: I hesitate to register a comment here in view of the Examiner's question, but it doesn't seem to me that the question of intent is pertinent, and just in the interest of prudently preserving our record, I request that that portion of his remarks relating to the purpose be stricken.

(Testimony of Edward McElroy Gardiner.)

Trial Examiner Miller: I would take it that the matter of intent could be inferred from such testimony of a factual character as the witness adduced as to what was done. However, as I view the issues in the way that the record has developed, I would assume that intent is a material fact, or may be, upon the issues as drawn, and for that reason I will overrule your objection. However, the record does show that you have preserved your objection.

Q. (By Mr. Weil): Did the action recommended by the Action Committee of "stop punching time clocks", was that ever consummated? [213]

A. No. In addition, this question was originally raised because of previous policies which had been made indicating the desire of the membership to discontinue such clock punching. A poll was made of the membership during the negotiations to determine whether such clock punching is still considered as an important negotiation item. The poll indicated that the membership did not so consider, and the company was advised and the item was dropped from the agenda of those items under consideration.

Q. Why did you cease to be Chairman of the Executive Committee? A. I resigned.

Q. Did you resign under any pressure or was it a personal resignation?

Mr. Perkins: What is the pertinency of that question?

Trial Examiner Miller: What is the materiality?

Mr. Weil: Mr. Holman's statements at the time he was pressing the inquiry about the new mem-

(Testimony of Edward McElroy Gardiner.)

bers of the Executive Committee possibly being a manner of voicing the dissatisfaction of the membership with the old Executive Committee, I thought it might be well to point out that the membership did not take the job away from him. He quit the job.

Mr. Holman: It is my understanding the objection was made to my line of inquiry and sustained.

Trial Examiner Miller: That is my recollection. I will sustain the objection at this point. [214]

Mr. Weil: That is all for me.

Recross Examination

Q. (By Mr. Cluck): Mr. Holman inquired as to the reasons elicited why this particular Manpower Availability Conference and the related placement and information procedure had failed. Did you mean to imply that such procedure had been abandoned in any way for the future SPEEA?

A. I did not mean to imply that in any manner.

Mr. Cluck: That is all.

Trial Examiner Miller: Is there any further recross?

Mr. Perkins: No.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Mr. Weil: I would like to call Mr. Frajola.

FREDERICK D. FRAJOLA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Would you give us your name and address, Mr. Frajola?

A. Frederick D. Frajola, 1040-20 Northeast, Seattle, Washington.

Q. What is your occupation, Mr. Frajola?

A. I am employed in the engineering department at the Boeing Airplane Company, classified as a designer. [215]

Q. Are you a member of SPEEA?

A. Yes.

Q. Do you hold any office in SPEEA?

A. I am the present Chairman of the Executive Committee of SPEEA.

Q. When did you become chairman?

A. I became Chairman of the Executive Committee of SPEEA in March of 1953.

Q. Did you immediately succeed Mr. Gardiner?

A. Yes.

Q. In the course of your duties as Chairman of the Executive Committee, did you write or cause to be written a letter to Mr. Logan, on or about March 31, 1953? A. Yes.

Mr. Weil: Would you mark this as General Counsel's No. 18?

(Testimony of Frederick D. Frajola.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 18 for identification.)

Q. (By Mr. Weil): Showing you what has been marked as General Counsel's No. 18 for identification, is that a copy of the letter which you wrote or caused to have been written?

A. That is correct.

Mr. Weil: I would like to offer this in evidence at this time, and I would like to suggest a stipulation that it is a true copy of the letter which was sent. [216]

Mr. Perkins: Could we go off the record a minute, Mr. Examiner?

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record. The pending question is as to whether the suggested stipulation that General Counsel's 18 is a true and correct copy of the letter that was sent and received——

Mr. Perkins (interrupting): There is no objection to the introduction of it.

Trial Examiner Miller: Very well. Mr. Cluck, any objection?

Mr. Cluck: No objection.

Trial Examiner Miller: Very well. There being no objection, General Counsel's Exhibit 18 will be received.

(Testimony of Frederick D. Frajola.)

(The document heretofore marked General Counsel's Exhibit 18 for identification, was received in evidence.)

[See page 515.]

Mr. Weil: Would you mark that 19?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 19 for identification.)

Q. (By Mr. Weil): Did you receive a reply to that? A. Yes.

Q. Is this the reply?

Mr. Perkins: The date of that? [217]

Mr. Weil: April 7.

A. This is the reply.

Mr. Weil: I would like to offer General Counsel's No. 19.

Trial Examiner Miller: Since the colloquy between counsel earlier in the hearing with respect to the document, General Counsel's Exhibit 19, indicates that there is no objection, and since I hear none, General Counsel's No. 19 will be received in evidence.

(The document heretofore marked for identification as General Counsel's Exhibit No. 19, for identification, was received in evidence.)

[See page 517.]

Q. (By Mr. Weil): Mr. Frajola, after you took over the chairmanship of the Executive Committee, had at that time the MAC as it was planned been dropped?

A. The MAC as it had been planned previous

(Testimony of Frederick D. Frajola.)

to my becoming the chairman of the Executive Committee has been dropped, yes.

Q. As far as the Executive Committee is concerned, is the plan of a MAC or conference similar to a MAC now a dead issue?

A. No. There is an active committee presently working within the SPEEA organization with the same idea in mind, that is, to act more or less as a placement bureau for those engineers that desire to leave Boeing, or as an employment agency to seek places or job opportunities for those engineers desiring to leave.

Mr. Perkins: We have no questions. And I might say that [218] Mr. Frajola is here under a subpoena duces tecum that was issued under our application, and that subpoena is discharged as far as we are concerned, and I assume Mr. Frajola will want to remain, but as far as we are concerned, he is excused.

Cross Examination

Q. (By Mr. Cluck): That last service that you speak of, is that confined to Boeing employees only, or is it open to all members of SPEEA?

A. It is open to all members of SPEEA.

Q. Irrespective of the employer that each has?

A. Yes.

Mr. Cluck: That is all.

Cross Examination

Q. (By Mr. Perkins): You represent—when I say "you" I mean SPEEA—you, Mr. Frajola, you

(Testimony of Frederick D. Frajola.)

represent employees at what other concerns, firms?

A. We represent employees at the Boeing Airplane Company, and at Continental Can Company. However, there are SPEEA members that leave the Boeing Airplane Company and still retain their membership within SPEEA.

Q. You are a certified collective bargaining agent only with respect to Boeing Airplane Company, Seattle Division, and the Continental Can?

A. That is correct.

Q. Can you tell us approximately the number of SPEEA members [219] that are employees of Continental Can?

A. I think it is 17, approximately.

Q. Have you any information as to the approximate number of employees that were SPEEA members and were employees of Continental Can during the fall of 1952 and this much of 1953?

A. I don't have that information.

Q. Do you have any information that would permit you to make an approximation or estimate?

A. No.

Mr. Perkins: That is all.

Trial Examiner Miller: Is there anything further?

Mr. Weil: Nothing further.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Mr. Weil: May we have a very short recess?

Trial Examiner Miller: We will recess for five minutes. (Short recess.)

Trial Examiner Miller: On the record.

Mr. Weil: General Counsel rests.

Trial Examiner Miller: On the basis of the discussion off the record before the General Counsel indicated his intention to rest, it is my understanding that the respondent company wishes some period of time to go through its files in order to determine which portions of the correspondence between SPEEA [220] and the company it wishes to adduce as part of its case in chief. Is that correct, Mr. Perkins?

Mr. Perkins: That is correct.

Trial Examiner Miller: On that understanding I will not at this time suggest that the respondent company proceed, but instead we will recess until 9:30 a.m. tomorrow morning.

(Whereupon, at 4:10 o'clock, p.m., Wednesday, June 24, 1953, the hearing was adjourned until tomorrow, Thursday, June 25, 1953, at 9:30 o'clock, a.m.) [221]

Trial Examiner Miller: The hearing will be in order.

Mr. Perkins: May I address the Examiner?

Trial Examiner Miller: Surely.

Mr. Perkins: It is my recollection that evidence adduced by the General Counsel in connection with the alleged issue, or the point made by the General Counsel as to the nature of the impasse was subject to an objection made by the respondent on the grounds of its relevancy and materiality, the contention being that such evidence is beyond the issues of this case.

It is my further recollection that the Trial Examiner overruled the objection subject to a later motion to strike on the part of the respondent.

Does that sufficiently summarize the nature and type of evidence to which I refer? Simply to refer to it as the evidence relating to the nature of the impasse?

Trial Examiner Miller: I think so. I have the portion of the record in mind.

Mr. Perkins: Respondent now moves to strike such evidence in response to the Trial Examiner's previous remarks that the previous motion of the respondent was overruled subject to a later motion to strike.

Trial Examiner Miller: I have given some consideration to the problem since announcing that ruling and since hearing the evidence. Before I announce my disposition of it, my present [224] thinking, I will ask if General Counsel has any observation.

Mr. Perkins: Am I correct in stating the nature of the ruling, Mr. Examiner?

Trial Examiner Miller: Yes, you are correct.

Mr. Weil: The General Counsel has nothing more to say than he has said before, that he considers this as highly pertinent background to the issues formulated by the complaint and answer.

Trial Examiner Miller: As I now view the problem with which we appear to be confronted in this proceeding, there appears to be a number of ways of formulating it, depending upon the point of view of the person addressing himself to the issue. One

such way that has occurred to me is the formulation suggested by General Counsel's representatives as to whether we have here a protected form of concerted activity, the challenge to which by the respondent poses an issue under the Act. Another way of looking at it is, perhaps, the formulation with which students in the field of labor relations law are familiar, namely, the question of whether or not we have a type of conduct on the part of Mr. Pearson and SPEEA inflicting what has been spoken of in this hearing as legal damage upon the respondent, whether or not there has been actual damage, for which any justification could be assumed to exist. Presumably, the concept of justification for the infliction of damage would be roughly to the concept of a protected, concerted activity in the field of labor relations law. [225]

As I thought about the problem, it occurs to me that the evidence which has been adduced as to the circumstances under which the impasse developed, the particular nature of the impasse, may have a bearing upon further consideration, on the question of whether or not the concerted activity, with which we are here concerned, was protected, concerted activity, or looking at it from the other formulation, it may have a bearing upon the question of whether or not any legal justification existed for the type of action taken by Mr. Pearson, the MAC committee and SPEEA. On that view of the situation, which, of course, is only tentative at this point, and depending upon my further study of the record, but on the view of the situation that I have

expressed, I can see a ground of relevancy and materiality here, and the motion to strike will be denied.

Mr. Perkins: Another matter, upon reviewing my notes last evening of the testimony and remarks that were made in yesterday's session, it occurred to me that the impression that might be drawn from some certain remarks that I made could possibly be an erroneous impression, and I ask leave of the Trial Examiner for an opportunity to attempt a correction with respect to those remarks.

Trial Examiner Miller: Surely.

Mr. Perkins: I am referring to the objection made by respondents, and the reasons given by respondent in connection with the materiality of the testimony adduced, or the statement made [226] by Mr. Gardiner with respect to certain purposes and intentions of SPEEA, and the group that was involved in the Manpower Availability Conference, and I intended at the time, certainly had it in mind, to confine my remarks as to the materiality to the type of statement that in respondent's view is a statement in the nature of a self-declaration of a subjective attitude. I want to negative any impression that my remarks might have conveyed, that respondent does not regard the intention and purpose of SPEEA in connection with the Manpower Availability Conference as a proper issue before the Board based upon the objective evidence in the record in this case.

Trial Examiner Miller: Yes. Very well. With

that explanation I think I understand respondent's position.

Mr. Perkins: And the Trial Examiner is aware of the remarks to which I am referring?

Trial Examiner Miller: Yes.

Mr. Perkins: The next item I would like to take up with the Trial Examiner is the matter of the form of our answer, and I am addressing these remarks strictly to the matter of pleading.

There are some comments made by the Trial Examiner on the first day of this hearing relating to the matter in respondent's answer on the fifth page thereof, under the heading "Further Grounds of Defense".

I am not sure that I understood the intended purport of [227] those remarks, where reference was made by the Trial Examiner in that connection to what was referred to as the St. Petersburg Times publishing case.

I would like to invite attention to the fact that the case to which reference was made is a case that was determined on the basis of the National Labor Relations Act prior to the amendment of the Labor Management Relations Act of 1947. And the difference there is that prior to those amendments there was no section in the nature of 8 (b) (3) as it now appears in the statute, and after the amendment the statute contained such a provision.

The point that respondent is bringing before the Trial Examiner and the Board in connection with the defense that I have mentioned is that it is respondent's contention that there was a violation of

Section 8 (b) (3) on the basis of the actions and statements of the charging union here in connection with the activities of the Manpower Availability Conference, and that thereby in accordance with respondent's view the activities which were in connection with that Manpower Availability Conference were illegal, illegal as being in violation of Section 8 (b) (3).

Now, I am of the impression that allegations such as are contained in the answer under the heading that I have mentioned are perhaps unnecessary and that the contention that I have just mentioned is available to respondent under the broad denial of any violation of 8 (a) (1).

Trial Examiner Miller: I would so assume. [228]

Mr. Perkins: But mindful of the rules of the Board which request at least that respondent state fully its grounds of defense, that language was inserted in respondent's answer in the interest of making the answer complete, and in the interest of prudent pleading. I think it is entirely possible under the present statute for there to exist perhaps simultaneously a violation of Section 8 (a) (5) and a violation of Section 8 (b) (3). That circumstance was, of course, impossible under the Act prior to the amendment. I don't think that there is any necessary interrelationship as a matter of law between Section 8 (b) (3) and Section 8 (a) (5), and we—and our intention and purpose in pleading as we did was to bring before the Trial Examiner and the Board the point that within respondent's view the actions of SPEEA which are of record in this

case, and will be of record at the completion of the case, constituted a violation of Section 8 (b) (3), therefore constituted an illegal act, and we are mindful of the situation that some writers have referred to as a conflict in the opinions of the several courts of appeal with respect to whether concerted activities are to be tested from a standpoint of protection on the basis of indefensibility or on the basis of legality. That completes my statement.

I wanted to be assured that the issue we intended to present is understood by the Trial Examiner.

Trial Examiner Miller: I understand the issue. Nothing that I said in regard to the respondent company's grounds of [229] defense to which you have just addressed yourself was intended in any way to strike that ground from the case. The defense is entirely available to the respondent and my remarks which impelled you to make the observations, were addressed merely to the question of the manner in which the issue was posed and not to the substance of the contention. The substance of the contention is one which may very properly be called to my attention and to the Board's attention.

Mr. Perkins: Thank you.

JAMES D. ESARY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Perkins): Will you state your name?

(Testimony of James D. Esary.)

A. James D. Esary.

Q. And what is your present occupation, Mr. Esary?

A. I am labor relations manager, Boeing Airplane Company.

Q. And you have been employed by Boeing Airplane Company how long?

A. Approximately seven and a half years.

Q. And you have been in the Boeing Airplane Company labor relations division ever since that time? A. I have.

Mr. Perkins: With the Trial Examiner's permission I am going to refer to it as Boeing. [230]

Trial Examiner Miller: Yes.

Q. (By Mr. Perkins): And you were so employed prior to the time that SPEEA was certified as a collective bargaining agent at Boeing?

A. That is correct.

Q. In what year was SPEEA so certified?

A. 1946.

Q. And the certification that you refer to was pursuant to a consent election?

A. That is right.

Q. Will you describe in a general way the unit then represented by SPEEA and the changes in the unit that have taken place since?

A. Well, originally the unit consisted of the engineering department of Boeing. Later, through a series of consent elections, they took over the tooling engineers, the chemists, the statisticians, and

(Testimony of James D. Esary.)

there may be other small groups. I don't remember at the moment.

Q. And you are familiar with the bargaining negotiations that have taken place since the original certification? A. I am.

Q. And you participated in all of those negotiations?

A. Yes, I did. I might have missed a meeting once in a while.

Trial Examiner Miller: Just in order that the record may be clear, since the pleadings indicate that Boeing has plants [231] both in Seattle and in——

Mr. Perkins (interrupting): I was going to explore that with another witness. I have previously assured the Trial Examiner that I would.

Trial Examiner Miller: Very well.

Q. (By Mr. Perkins): Previous to 1952 the negotiations each year, including and after the year of original certification, resulted in the consummation of a collective bargaining agreement between the parties? A. That is right.

Q. Have there been any work stoppages during that period?

A. There have not as far as SPEEA is concerned.

Q. To your knowledge, the relationship between the parties has otherwise been an amicable relationship during that period?

A. I would say they have.

Q. What was the date that the old contract went

(Testimony of James D. Esary.)

out of existence? I am referring to the contract that was in effect for a portion of the year of 1952.

A. That would be in August, 1953, August 21, I believe.

Q. 1952, you mean?

A. 1952, yes. Excuse me.

Q. Except for the increase of March 12, 1953, the conditions of the old contract have continued since the date of its consummation and down to the present time? A. That is right. [232]

Q. Can you tell us the approximate number of employees in the collective bargaining unit represented by SPEEA at the Seattle Division of the Boeing Airplane Company?

A. Approximately 3500.

Q. This was true also, approximately, during the period of the 1952 negotiations and down to the present time?

A. Yes.

Q. Did the company regularly receive from SPEEA the SPEEA newsletters and newspapers?

A. Yes, we did.

Q. This was a matter of regular practice between the parties? A. That is right.

Q. As to the increase of March 12, 1953, this increase was mentioned in correspondence between the company and SPEEA in the period prior to the date of the increase? A. Yes, it was.

Mr. Perkins: I would like to have these marked for identification as Respondent's Exhibit 1 through 21, inclusive.

(Testimony of James D. Esary.)

(Thereupon the documents above referred to were marked Respondent's Exhibits 1 through 21, inclusive, for identification.)

Mr. Perkins: I am willing to lay the foundation and offer these separately, or permit General Counsel's representatives to examine all the exhibits at the present time and make my offer an inclusive offer or collective offer, whichever is preferred or indicated by the General Counsel. [233]

Mr. Tillman: We can probably stipulate to the identity of most of them by looking at them.

Trial Examiner Miller: Very well.

Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Mr. Weil: General Counsel is willing to stipulate that these letters were sent and received as indicated.

Mr. Perkins: May I identify them in the record first?

Trial Examiner Miller: Surely.

Mr. Perkins: I think it would expedite it if I was to identify these letters on the record as to the writer and the addressee and as to the date, and as to any other characterizations that are generally indicative of the letter. If General Counsel is agreeable to that procedure, I think it might expedite it instead of having the witness testify.

Trial Examiner Miller: I think I prefer it that way, inasmuch as there is a stipulation offered that the letters were sent and received, as their dates

(Testimony of James D. Esary.)

and salutation would show. I think you can go ahead on that basis, Mr. Perkins.

Mr. Perkins: Respondent's Exhibit 1 for identification is a letter from SPEEA to respondent dated April 2, 1952.

Respondent's Exhibit No. 2 for identification is a letter from respondent dated April 3, 1952, to SPEEA.

Respondent's Exhibit 3 for identification, a letter dated [234] June 27, 1952, from respondent to SPEEA.

Respondent's Exhibit 4 for identification, a letter dated July 10, 1952, from SPEEA to respondent.

Respondent's Exhibit 5 for identification, a letter dated August 25, 1952, from SPEEA to respondent.

Respondent's 6 for identification, a letter dated July 21, 1952, from SPEEA to respondent.

Respondent's Exhibit No. 7 for identification, a letter dated July 24, 1952, from respondent to SPEEA.

Respondent's Exhibit No. 8 for identification, a letter dated September 3, 1952, from respondent to SPEEA.

Respondent's Exhibit No. 9 for identification, a letter dated November 20, 1952, from respondent to SPEEA.

Respondent's 10 for identification, a letter dated December 20, 1952, from SPEEA to respondent.

Respondent's 11 for identification, a letter dated December 26, 1952, from respondent to SPEEA.

(Testimony of James D. Esary.)

Respondent's 12 for identification, a letter dated January 5, 1953, from SPEEA to respondent.

Respondent's 13 for identification, a letter dated January 7, 1953 from respondent to SPEEA.

Respondent's 14 for identification, a letter dated January 29, 1953, a letter from respondent to SPEEA.

Respondent's 15 for identification, a letter dated February 6, 1953, from SPEEA to respondent.

Respondent's 16 for identification, a letter dated February 11, 1953, from respondent to Mr. Charles Robert Pearson.

Respondent's 17 for identification, a letter dated March 6, 1953, from SPEEA to respondent.

Respondent's 18 for identification, a letter dated March 12, 1953, from respondent to SPEEA.

Respondent's 19 for identification, a letter dated April 8, 1953, from SPEEA to respondent.

Respondent's 20 for identification, a letter dated April 15, 1953, from respondent to SPEEA.

Respondent's 21 for identification, a letter dated May 6, 1953, from respondent to SPEEA.

Respondent proposes to stipulate that these letters marked for identification as Respondent's Exhibits 1 through 21 be admitted in evidence, and that it be further stipulated that the letters were sent by the party indicated thereon in each case and were received by the addressee indicated thereon in each case, and that there will be no objection made wherein some instances an original is not the exhibit offered, but rather a copy is offered,

(Testimony of James D. Esary.)

not as part of the stipulation but as a reservation on the part of the respondent. This offer is, of course, subject to the objections previously made by respondent with respect to the materiality or relevancy of evidence adduced in General Counsel's case in chief with respect to the evidence adduced by General Counsel, said by General Counsel to bear on [236] the point of the nature of the impasse.

Trial Examiner Miller: Very well. Is the stipulation suggested agreeable to the other parties?

Mr. Weil: It is agreeable, except insofar as the offer which refers to the objections made by respondent yesterday.

Trial Examiner Miller: I take it that as the offerer, Mr. Perkins is not imposing an objection to his own offer, that he is merely indicating for the record that the reason he is offering the counter line of testimony which was introduced over an objection.

Mr. Perkins: I am simply saying, in effect, that there is no intention to waive our previous position in offering this evidence.

Mr. Weil: Then we will accept the stipulation.

Mr. Cluck: It is agreed.

Trial Examiner Miller: Very well, pursuant to a stipulation which is noted for the record, Respondent's Exhibits 1 through 21, inclusive, will be received in evidence.

(Testimony of James D. Esary.)

(The documents heretofore marked Respondent's Exhibits Nos. 1 through 21, inclusive, were received in evidence.)

[See pages 519-550.]

Q. (By Mr. Perkins): In referring to the letters from the company to SPEEA of December 26, 1952, and January 7, March 2, and March 12, of 1953, and also to the letters from SPEEA to the company dated January 5, 1953, February 6, 1953, and March 6, 1953, are those the letters to which you refer? [237] A. Yes.

Q. The increase that is mentioned in the complaint was in effect March 12, 1953?

A. Yes, that is correct.

Mr. Perkins: Would you mark that for identification as Respondent's Exhibit 22?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 22 for identification.)

Q. (By Mr. Perkins): Submitting for your examination what has been marked for identification as Respondent's Exhibit 22, will you describe the exhibit for identification?

A. Well, this was a notice attached to all the checks that went out to the members of the SPEEA bargaining unit. The first check, which reflected the six per cent increase.

Mr. Weil: No objection.

Q. (By Mr. Perkins): As I understand your statement, this notice was attached to every check that was sent to an employee in the collective bar-

(Testimony of James D. Esary.)

gaining unit represented by SPEEA, which, referring to the check, first reflected the increase of March 12, 1953, to which you previously referred?

A. That is correct.

Q. Such a check and such a notice was sent to every employee in that unit at that time?

A. That is right.

Mr. Perkins: Respondent offers what has been marked for [238] identification as Respondent's Exhibit No. 22.

Trial Examiner Miller: I understood there was a previous indication that there was no objection.

Mr. Weil: That is correct.

Trial Examiner Miller: Very well. Respondent's Exhibit 22 will be received.

(The document heretofore marked Respondent's Exhibit No. 22 for identification, was received in evidence.)

[See page 550.]

Q. (By Mr. Perkins): On the matter of the increase, and in the period prior to the time that it was placed in effect, was it discussed in negotiations between the parties in addition to which mention was made in the exchange of correspondence?

A. It was.

Q. As to the amount of the increase, was it less than the amount of the increase that had been requested by SPEEA? A. It was.

Q. Since Mr. Pearson's discharge and reemployment, will you briefly describe the situation as to the contract negotiations between the parties?

(Testimony of James D. Esary.)

A. Well, there has been one or two negotiation meetings, and then since the new executive committee has come into office there have been several informal meetings by a part of the executive committee in my office covering various subjects. We were told by these gentlemen that they were preparing a proposal to the company and would request negotiations at a later date. [239]

Q. What is the situation at the present time?

A. At the present time we received last week a letter from SPEEA negotiating committee requesting meetings. As a matter of fact, they requested a meeting this week. I have informed them we will hold such a meeting as soon as we can after this hearing is completed.

Q. Mr. Esary, what is the suggestion system? What is referred to as the suggestion system of the Seattle Division of the Boeing Airplane Company?

A. Well, we have a system down there where certain employees may make suggestions to the company for improvement of, oh, practices or manufacturing methods, tools, so forth, and if these suggestions are accepted, monetary awards are given to the individual to repay him for the value the company may receive out of such a suggestion.

Q. Does SPEEA participate in the suggestion system at the present time? A. They do.

Q. How long has that been true?

A. Well, for a long time the so-called non-exempt SPEEA engineers participated. The exempt engineer was not eligible for participation.

(Testimony of James D. Esary.)

But during the course of our negotiations SPEEA requested that the exempt engineers be included, and that now has been done, they are now eligible for the suggestion system.

Q. How did that develop? [240]

Trial Examiner Miller: Before we pursue the matter further, I would like to just clear up one little side issue for the record.

Q. (By Trial Examiner Miller): Since the concept of an exempt classification and non-exempt classification has now appeared in our record, both in testimony and in exhibits, would you please——

Mr. Perkins (interrupting): I will attempt the statement and determine whether General Counsel is in agreement.

Trial Examiner Miller: Very well.

Mr. Perkins: The distinction drawn in referring to exempt and non-exempt employees is the same distinction that is drawn in the Fair Labor Standards Act.

Trial Examiner Miller: Is that the understanding of the General Counsel?

Mr. Weil: I am informed that is fair enough.

Trial Examiner Miller: Very well. It is so stipulated, then, gentlemen.

Mr. Cluck: Yes, that is substantially correct.

Mr. Weil: Yes.

Trial Examiner Miller: The stipulation is noted for the record.

Q. (By Mr. Perkins): The SPEEA collective

(Testimony of James D. Esary.)

bargaining unit contains both exempt and non-exempt employees? A. That is right.

Q. Will you tell us, will you describe the development that [241] you have just mentioned, how it came about, and what was done by the company with respect to placing the so-called suggestion system in effect? And I wish in that description you would also identify the approximate time, if you recall.

A. Well, as I stated, SPEEA during the course of negotiations requested that the exempt engineers be included in that suggestion system and be allowed to participate in monetary awards for suggestion that they might make. The company considered that and then we rewrote the management procedure which covered the suggestion system, and changed it sufficiently to allow the exempt engineers to be eligible to participate. That was effected——

Q. (Interrupting) Was the action taken, to the best of your knowledge, in accordance with the SPEEA request?

A. Yes, it was a result of their request.

Q. What are we talking about in terms of possible remuneration in connection with the system?

A. Do you mean to an individual?

Q. To an individual, yes.

A. I don't think that there is any limit placed on the amount. I happen to be familiar with one case where an individual received something over $2,000, approximately $2,500, as I remember it, for one suggestion.

(Testimony of James D. Esary.)

Q. In the period immediately after Mr. Pearson's discharge, how was the matter of the discharge handled between the parties [242] as a matter of negotiation or as a grievance?

A. SPEEA started out making it a matter of bargaining negotiations. Then shortly after that time we were informed that they had decided to take it out of the bargaining classification and handle it as a grievance.

Q. How were you so informed?

A. We were informed in a negotiation meeting.

Q. By whom, do you recall?

A. Mr. Gardiner, I believe.

Q. About when did that occur, Mr. Esary?

A. I believe it was in the meeting of February 6, we discussed that and then agreed to have other conferences on it, which we did, with sub-committees of SPEEA.

Q. That situation, I am referring to the agreement of the parties to treat this matter as a grievance, remained true up until the time of and subsequent to Mr. Pearson's reemployment?

A. That is correct.

Q. (By Trial Examiner Miller): I believe a few moments ago, Mr. Esary, you were about to say what your best recollection was as to when the extension of the suggestion system to exempt employees in the SPEEA bargaining unit became effective.

A. My memory is, Mr. Examiner, it took several months to rewrite the procedure and so on, and so

(Testimony of James D. Esary.)

forth, and I believe it was made effective and announced some time in March of '53.

Trial Examiner Miller: All right. [243]

Q. (By Mr. Perkins): When was company action initiated on it?

A. The company action was initiated on it, oh, at least some three months before.

Q. What is the explanation for the interval of three months?

A. Well, we have a management procedures committee down there. Our division recommended that there people be made eligible for the suggestion system. Another division of the company is responsible for writing management procedures and receiving approval of them, and it took them that length of time to get around to rewriting and getting the necessary approvals and issue it.

Q. I am submitting for your examination General Counsel's Exhibit No. 19, which is a letter dated April 7 from the company to SPEEA and it indicates that you are the individual that signed the letter on behalf of the company. Is that correct?

A. Yes, sir, that is right.

Q. The statement in the last paragraph as of that letter is as follows: "On March 17 Mr. Pearson was reemployed pursuant to the offer set forth in our letter of March 2, quoted above. On its own initiative the company restored his company service, sick leave, accumulated before termination, his extended vacation eligibility, and applied the six per

(Testimony of James D. Esary.)

cent increase for time worked retroactively to July 1, 1952."

Will you explain how the restoration of those items developed, Mr. Esary?

A. Well, in our conferences with SPEEA regarding Mr. Pearson, [244] they were principally addressed to the position of the parties regarding Mr. Pearson's actions, and to what would be Mr. Pearson's status when he returned to the payroll, in other words, how he would be treated.

Q. Were these items that were mentioned in the letter important subjects of discussion at these conferences?

A. I was coming to that. These items were not brought up. When Mr. Pearson decided to return to the payroll, we considered the matter, and having no animosity towards him, we decided that we would restore those privileges which he had accumulated prior to his termination, and proceeded to do so.

Q. You were not present on the occasion of Mr. Pearson's discharge on January 27, 1953, were you?

A. I was not.

Q. But you are acquainted with the fact that SPEEA executives immediately thereafter requested bargaining with the company on the matter? A. I am.

Q. And the company responded by expressing its willingness to have a meeting on the matter?

A. That is right.

(Testimony of James D. Esary.)

Q. And you were in attendance at these meetings subsequent to the discharge?

A. I was.

Q. Will you state very briefly the substance of the discussions [245] and the respective positions taken by the parties in these discussions?

A. SPEEA took the position that Mr. Pearson's actions and the MAC were proper courses of action, ethically correct and they saw no reason why they shouldn't have proceeded with it. The company took the diametrically opposite position that the course of action was not ethical, it was not proper, that it was not a protected activity. There was a lot of discussion back and forth, but neither party was able to convince the other and the positions were not changed.

Q. How many meetings do you recall in which this matter was discussed by the parties at which you were in attendance?

A. I recall three. There was one where the subject was discussed in a formal negotiation meeting. There were two other meetings held with, as I say, sub-committees of SPEEA in Mr. Logan's office, at one of which Mr. Logan was present and the other I conducted.

Q. On the subject of the Manpower Availability Conference, was information communicated to you by SPEEA as to the responses that SPEEA had received in reply to the twenty-eight hundred some odd letters that were sent out over Mr. Pearson's signature to other employers around the country?

(Testimony of James D. Esary.)

A. There was.

Q. Who gave the information to you and how was it communicated?

A. Mr. Gardiner called me on the telephone.

Q. That was approximately when?

A. That was sometime in February of '53.

Q. Will you state the substance of that conversation?

A. Yes. He told me that they had sent out 2800 or, I believe, approximately 2800 invitations. That around 100 of them had been returned to them for lack of proper address and that they had received 12 replies.

Q. (By Trial Examiner Miller): Do you recall whether this telephone call was before or after the first meeting which you described as a negotiation meeting in which the question of Mr. Pearson's discharge was discussed?

A. That I believe was after that meeting.

Trial Examiner Miller: Very well.

Mr. Perkins: You may examine.

Cross Examination

Q. (By Mr. Weil): Mr. Esary, your position is labor relations manager, is that correct?

A. That is correct.

Q. What are your duties in that position?

A. It is my responsibility to negotiate all union contracts and administer those contracts, handle all employee complaints, responsibility for employee

(Testimony of James D. Esary.)

relations generally, and whatever else comes along under those broad terms.

Q. In the matter of this wage increase, what was the purpose, if you can tell us, of the company instituting that wage increase? [247]

A. The reason that we instituted it?

Q. Yes.

Mr. Perkins: I object to that, Mr. Examiner. It seems to me that that is even outside the scope of the Examiner's ruling. I object to it on the grounds of its materiality and relevancy.

Mr. Weil: Inasmuch as the unilateral wage increase is one of the matters complained of in this case, I fail to see how the purpose of the company in the instituting of that unilateral wage increase could be considered anything but pertinent.

Mr. Perkins: In view of counsel's statement, I will withdraw the objection.

Trial Examiner Miller: Very well.

A. The question was, I believe, what was the purpose of the company instituting that?

Q. (By Mr. Weil): Correct.

A. The reason we instituted the six per cent was simply that on the basis of national information that had come to us from various sources showing the average hiring in rate of college graduates, we found that we were approximately six per cent low in our offering, so knowing that the spring hiring campaign was coming up, our recruiting teams were ready to go out to visit the colleges, we felt that it was absolutely a business

(Testimony of James D. Esary.)

necessity to raise our rate by six per cent to become competitive if we were to be able to hire any of the graduating class or classes, rather, of the colleges around the country. Of course, it would [248] be bitterly unfair to hire a new man in at a rate that was higher than the man you had hired the month before, so therefore we extended the six per cent right up the line.

Q. At the same time that you instituted this increase did you institute the increase in overtime?

A. Yes. We put in the so-called Lockheed formula.

Q. Could you explain what the Lockheed formula is? Is there a simple explanation?

A. Yes.

Trial Examiner Miller: Referring to Respondent's 22.

Mr. Weil: Thank you.

Q. (By Mr. Weil): Was that increase in overtime made retroactive?

A. It was made retroactive to January 2, 1953.

Mr. Weil: Mr. Examiner, may we have a short recess?

Trial Examiner Miller: Very well, we will recess for five minutes.

(Short recess.)

Trial Examiner Miller: The hearing will be in order.

Mr. Perkins: I am under the impression that my continuing objection as to the line of testimony on the matter of the nature of the impasse of the

(Testimony of James D. Esary.)

bargaining evidence up to the time of the discharge of Mr. Pearson is irrelevant and immaterial, and by withdrawing my objection I didn't understand that I was waiving a continuing objection.

Trial Examiner Miller: Yes. [249]

Q. (By Mr. Weil): Mr. Esary, you discussed the suggestion of extension of the suggestion system, to these engineers. Can you recall in what manner this suggestion was brought up by SPEEA?

A. Well, it was part of a discussion of all the various conditions that apply at Boeing for engineers. My memory is that SPEEA had made us a proposal that they be allowed a pool of 20 per cent of the so-called incentive plan at Boeing to be set aside for SPEEA engineers. And in their arguments supporting that they stated that they were neither fish nor fowl because the supervisors participated in the incentive plan and they did not, and the supervisors were barred from the suggestion system and so were they. They didn't think they should be barred from both. And after consideration on our part that seemed somewhat reasonable that they shouldn't be barred from both, so we consented to their request, and, as I say, it took a considerable period to work it out and put it into effect.

Q. As a matter of fact, what had they asked to be included in was the incentive plan?

A. They asked for the suggestion system in lieu of the incentive plan when we were unwilling to concede to their demands.

(Testimony of James D. Esary.)

Q. To what demands?

A. Demands for inclusion, for a 20 per cent pool, for a 20 per cent portion of the incentive pool to be set aside for engineers.

Q. You mentioned that you had in mind one individual whose suggestion netted him a total of something like $2500. Can you [250] tell me what the average income to the average employee from the suggestion plan at Boeing is?

A. I do not have those figures in mind. I don't know that I have ever known. We tried at one time at SPEEA's request to come up with an average figure.

Mr. Perkins: There is no question about the fact that it is substantially less than that and we don't intend to convey any other impression.

The Witness: The fact that that was outstanding was the reason that it stays in my mind.

Q. (By Mr. Weil): Can you tell me how many awards are made on an annual basis?

A. How many awards?

Q. Under the suggestion plan.

A. I don't have that information in my mind. But, of course, it would vary from year to year depending upon the suggestions of what comes up.

Q. Can you tell me, do you have any idea what the figures were for 1952? A. No, I do not.

Trial Examiner Miller: Before this goes any further, I think I would like a little explanation to the record as to the significance that each party attaches to this suggestion plan.

(Testimony of James D. Esary.)

Mr. Perkins: My intention in asking Mr. Esary a question along that line, Mr. Examiner, was simply to put in the record [251] for your consideration and the Board's consideration the general picture of the relationships, attitudes, and feelings of the parties one towards the other during the period that we were interested in here down to the present time. It certainly was not introduced with the intention of placing what I would consider undue emphasis on the dollar amount involved in the particular item under discussion here. I thought it was part of background material that would be of interest to you and to the Board. I regarded it in the same category as the questions that I asked and the evidence that was introduced relating to the previous bargaining history.

Trial Examiner Miller: Very well. For that purpose I am satisfied that it is admissible and proper in the hearing but I raise the question for the guidance of counsel as to how thoroughly we can litigate. You can guide yourself accordingly.

Mr. Tillman: I think our concern was whether it was a demand made by SPEEA and granted by the company or whether it was a company originated idea which was put into effect.

Trial Examiner Miller: Very well.

Mr. Perkins: I would be willing to have the witness answer on that one.

Trial Examiner Miller: I don't know but what our record is already sufficient on that point. I merely raised the question for the guidance of coun-

(Testimony of James D. Esary.)

sel. I am not making a ruling nor restricting the examination in the light of the discussion, if the [252] subject has been explored as it might fully be explored, then we can pass on to something else.

Mr. Weil: That is all the cross examination.

Trial Examiner Miller: Mr. Cluck?

Mr. Cluck: I have no questions.

Trial Examiner Miller: Mr. Perkins?

Mr. Perkins: The witness is excused.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Mr. Perkins: Mr. Logan.

A. F. LOGAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Perkins): Your name is Mr. A. F. Logan? A. That is right.

Q. And you are presently vice president of Boeing Airplane Company, Seattle Division, in charge of industrial relations?

A. That is correct.

Q. And you have been in charge of industrial relations of the Seattle Division of the Boeing Airplane Company since what date?

A. January 1946.

Q. Inquiry has previously been made here as to the significance of the Seattle Division, and I would appreciate your describing the operations of the

(Testimony of A. F. Logan.)

Boeing Airplane Company and the locations [253] of those operations that are considered to be within the purview of that term "Seattle Division".

A. We have in Seattle, first, a corporate headquarters of Boeing Airplane Company. In the Seattle area we have plant one, plant two, and the Renton plant. We have warehouses scattered all over King and Pierce Counties, but the three I have mentioned are the principal manufacturing operations. At plant two, which is located in Seattle and King County, it straddles the city limits, is the headquarters of the corporation, all of the corporate offices and all of the executive offices. That portion of the Boeing Airplane Company is referred to as the Seattle Division.

Q. There are two divisions of the Boeing Airplane Company? A. That is correct.

Q. It is a single corporation?

A. It is a single corporation.

Q. And the other division referred to is what?

A. Wichita Division, located in Wichita, Kansas.

Mr. Perkins: I would invite questions from the Trial Examiner, if the subject, in his opinion, should be covered more completely.

Trial Examiner Miller: No, I think that is adequate.

Q. (By Mr. Perkins): You are familiar with the discharge of Mr. Pearson on January 27, 1953?

A. Yes. [254]

Q. And you were present at the time of such discharge and placed such discharge in effect?

(Testimony of A. F. Logan.)

A. Yes.

Q. As I understand it, the later portion of the conversation that took place on the occasion of Mr. Pearson's discharge was reduced to stenographic notes and that is here in evidence as General Counsel's Exhibit 7. Is that correct?

A. I don't know whether it is 7 or not. I haven't seen it.

Q. I am sorry, Mr. Logan, I should have handed it to you. A. I know it is here.

Q. Will you read it, please?

A. My answer is yes.

Q. And those transcribed notes that appear in General Counsel's Exhibit 7, in your opinion correctly reflect the conversation that took place in the later part of the conference to which I refer?

A. That is correct.

Q. Will you please give your version of what took place at that conference and on that occasion prior to the time that the taking of those stenographic notes began?

A. Mr. Pearson came into my office, at which time there was present Mr. Soderquist, and I asked him to sit down and told him I wanted to talk to him informally, and he sat down, and I told him I wanted to talk to him about this so-called MAC and I asked him if it were a fact that he was a licensed and bonded employment [255] agent. Mr. Pearson probably at that time very early in this conversation asked for representatives of SPEEA to be present. I told him I didn't think that was

(Testimony of A. F. Logan.)

necessary since this was an informal meeting and I simply wanted to get some information from him. So I again asked him if he was a licensed and bonded employment agent. He then started to write in a loose-leaf memorandum book which he had with him, which he had brought in with him and he wrote at some considerable length, and Soderquist sat and watched him, and when he had concluded his writing he read to me what he had written. And as I recall, that statement which he read was to the effect that the Manpower Availability Conference as an activity of SPEEA and his participation in it was as a part of his duties as a SPEEA committeeman, and he didn't consider it was proper for me to question him on that matter, without considering or accepting the fact that it was a SPEEA activity. And he may again at that time have suggested or expressed the desire to have SPEEA members present. I picked up from my desk the letter of invitation which had been sent out to these several employers all over the United States and asked him if the signature on that letter was a facsimile of his, and he again started to write. So we waited and watched him write, maybe five minutes, it may have been ten, but it was a considerable time, and we simply sat and let him finish writing. And he again read his reply to me and again reiterated a portion of what he had written and then he claimed that I was conducting a [256] personal inquisition against him. I told him that it was neither personal or an inquisition,

(Testimony of A. F. Logan.)

that I was merely attempting to obtain some facts from him. At some point about that time, I do not recall whether he wrote two or three fairly lengthy answers, I said to him, "If you want a record of everything you say, which you appear to want, then let's get a record of everything both of us say." So then I called in a secretary and directed her to take notes on the conversation as she heard it from then on in. Mr. Pearson refused to give me any information as to the conference or his status with it——

Q. (Interrupting) You are referring to the Manpower Availability Conference?

A. The Manpower Availability Conference or his relationship to it, or his participation in it, and so I told him then——

Q. (Interrupting) Was the rest of it transcribed or are you still referring to the——

A. (Interrupting) I believe the rest of it is transcribed from then on.

Q. Do you want to inspect the exhibit, Mr. Logan?

A. I would like to inspect it to see whether the statement I am about to make is or is not in that transcript.

Q. I am placing in your hands General Counsel's Exhibit 7.

A. The balance of my statements to him at that time are contained in the transcript.

Q. Will you briefly give your previous company practice with [257] respect to termination of in-

(Testimony of A. F. Logan.)

dividuals in the SPEEA unit, as to whether it was customary for SPEEA officials to be present.

A. It never has been or had been necessary for SPEEA members to be present.

Q. Had SPEEA ever objected to that practice?

A. Not to my knowledge.

Q. Handing you the undated SPEEA letter to you which bears a notation indicating that it was received by the company on 1/23/52, which is General Counsel's Exhibit No. 5, that was the letter in which SPEEA advised you that it "had started and will complete a Manpower Availability Conference". In the fourth paragraph of that letter it is stated, "In offering this service to its members, SPEEA has retained an agency for bringing together those engineers and companies who may care to discuss employment possibilities". At the time when you received the letter, did you have any idea or information as to the identity of the "agency" to which reference is therein made?

A. None whatever.

Q. Did you have any basis for connecting such agency with Mr. Pearson's name?

A. I had never heard of Mr. Pearson at that time.

Q. When did you first see the form letter entitled "Are you in need of additional engineers", that bore the facsimile of Mr. Pearson's signature, which is General Counsel's exhibit No. 4? [258]

A. Oh, it was about the same time. I don't have a clear recollection of whether it was at the same

(Testimony of A. F. Logan.)

time or within the next two or three days thereafter.

Q. At that time were you aware of the fact that Mr. Pearson was a Boeing engineer?

A. No, I didn't know anything about him. I had never heard of him.

Q. After you first saw the form letter entitled, "Are you in need of additional engineers", what did you do with respect to Mr. Pearson?

A. The only thing I did at that time was to ask, "Well, who is Pearson?" That is all. I had never heard of him before.

Q. What transpired in that connection after that?

A. I was told by a member of the engineering staff that Pearson was a Boeing engineer.

Q. What did you do then?

A. I said, 'Bring him in here, I want to talk to him."

Q. What occurred after that?

A. I was told that he was out of the city.

Q. Continue with the events that led up to the conference at which time his discharge was effected?

A. I asked where he was and I was told he was in Los Angeles representing the company in some technical meeting of some type or other that was going on down there. So I said, "Send him a wire and tell him to come back." The wire was sent and he came [259] back. When he came back he was brought to my office and that is when the conver-

(Testimony of A. F. Logan.)

sation took place that I have previously testified about.

Q. You are familiar with the negotiations that occurred between SPEEA and Boeing during the 1952-53 period? A. Yes, I am.

Q. Had you received information prior to your first meeting with Mr. Pearson as to the action that was contemplated by SPEEA in connection with the Manpower Availability Conference?

A. Yes, I had.

Q. Over what period of time had you received such information? A. Several months.

Q. In what form or by what means did you receive such information?

A. I think I received it principally from the various bulletins published by SPEEA committees. I receive a copy of the bulletin published by the so-called action committee which laid out numbers of, let us say, contemplated action against the company, and there were occasionally informal meetings of these various activities that myself and my staff had with SPEEA members and SPEEA officers. These references and this information came in that form over a period of several months.

Q. What was the information that you received during this period as to the proposed Manpower Availability Conference, that is, the nature of it, what it was intended—what its intended [260] objectives were, and so forth?

A. Considering all of the information which I received from any source, I merely considered the

(Testimony of A. F. Logan.)

Manpower Availability Conference as another one of the pressure moves like many others which I was aware of that SPEEA had in contemplation. I never considered it anything else but that.

Q. Aside from how you considered it, Mr. Logan, what did the information indicate as to the objectives of the Manpower Availability Conference?

A. It indicated, I should—it is indicated the objective was to deprive us of the services of a sufficient number of engineers to impair our projects and thereby bring pressure on us to meet SPEEA demands.

Q. Was any similar information received by you during that period that would indicate the nature of the other types of action that you stated to be as, I think you characterized them, as other forms of contemplated actions on the part of SPEEA?

A. Yes, I did. I will not characterize them as, at least in my belief, contemplated coercive or pressure action.

Mr. Perkins: I ask that that be stricken as immaterial. I just want to know how they characterize the information received, what their objectives were and what they were.

The Witness: They were characterized——

Mr. Cluck (interrupting): We object to this question, Mr. Examiner, on the grounds that it is hearsay, and on the further [261] grounds that it relates to acts apart from the Manpower Availability Conference, whereas, in the answer of respondent matters relating to the Manpower Availability Con-

(Testimony of A. F. Logan.)
ference are the only ones that are alleged to involve anything in the nature of unfair action or labor practice on the part of SPEEA.

A broad question like that invites inquiry into one of a number of undisclosed acts not referred to in respondent's answer, and we submit not related to the issue as to whether or not the Manpower Availability Conference is a legally protected, concerted activity.

Trial Examiner Miller: Insofar as the objection relates to the hearsay character of the witness's possible response, I will make this observation, that I can see in the general line of examination, and the form of the question, the possibility that a response may be elicited which has both hearsay aspects and non-hearsay aspects. I propose to receive the evidence only in its non-hearsay aspect with respect to the objection, presented to relevancy and materiality posed in the light of the pleadings. The objection is overruled.

Mr. Perkins: May I be heard on the point as to hearsay, Mr. Examiner, or have you ruled?

Trial Examiner Miller: I have ruled that I would receive it only insofar as it had a non-hearsay character. Specifically I have in mind this, that if the evidence is offered as providing the basis of subsequent action and a motive for subsequent [262] action, irrespective of the accuracy or truth or asserted truth of the matters recited through Mr. Logan, I will receive the testimony as indicating or

(Testimony of A. F. Logan.)

providing some basis for inference as to the motive for future action taken.

Mr. Perkins: I understand.

Q. (By Mr. Perkins): Will you now answer, Mr. Logan, please?

A. I started to say that these various activities were characterized in the bulletins emanating from various SPEEA committees which we read as pressure activities. That was the stated objective set out on their behalf in some of these various bulletins that were read.

Q. What were they?

A. Oh, such things as I have mentioned here before, refusal to punch time clocks, refusal to work overtime, what has been referred to as spot half-day strikes, timed by a group or department, the peculiar coincidence of everyone in the department having a dental appointment at the same hour on the same day, others of that nature.

Q. Do you recall any negotiations with SPEEA on February 6, 1953, where the possibilities of damage to the company as the result of the Manpower Availability Conference was discussed?

A. I recall such a discussion. It was about that time. I don't know whether it was at that precise meeting or not, but I do recall a discussion in negotiations held about that time.

Q. Will you please state your recollection of the remarks on [263] that subject that were made at that time by both parties?

A. Insofar as my remarks were concerned, it

(Testimony of A. F. Logan.)

is my recollection that I stated that these activities, and particularly the so-called Manpower Availability Conference, were merely intended to damage the company to the extent that it would acquiesce in some or all of the maximum demands of SPEEA. I simply elaborated my reasoning on that to some extent and that reasoning simply ran along the lines that we didn't consider it either ethical or proper or legal, or, as I recall, I think I maybe said honest for people to attempt to remain on our payroll while they tried to tear us down.

Q. Do you recall another negotiation meeting on September 5, 1952, at which possible coercive action by SPEEA against the company was discussed?

A. This is an earlier meeting, I think, than the one I have been talking about. Let's see if I am straight on your question.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Q. (By Mr. Perkins): Do you recall any negotiation meeting in the fall of 1952 where the matter of possible damage to the company as a result of the Manpower Availability Conference was mentioned by SPEEA representatives there? I am not asking you to identify the individual. [264]

A. Yes, there was such a meeting and such comments were made by SPEEA representatives.

Q. Can you give your recollection of the substance of those remarks?

(Testimony of A. F. Logan.)

A. In substance, the remarks were that it was possible that MAC might damage Boeing, but only if and to the extent that Boeing salary scales were not competitive. That if those scales were found to be competitive in the opinion of SPEEA, that no damage would accrue to Boeing. On the contrary, if they were found to be noncompetitive that, yes, material damage could happen to Boeing.

Q. After the conference at which Mr. Pearson was discharged, as I understand it, the executives of SPEEA immediately requested a conference with the company on the matter of Mr. Pearson's discharge. A. That is correct.

Q. What was your response to that request?

A. I told them we would have such a conference at their convenience.

Q. That response was conveyed in writing?

A. That is right.

Trial Examiner Miller: At this time we will recess until 1:15 p.m.

(Whereupon, a recess was taken until 1:15 o'clock p.m.) [265]

After Recess—1:15 p.m.

Trial Examiner Miller: The hearing will be in order.

A. F. LOGAN

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Perkins): Inviting your attention

(Testimony of A. F. Logan.)

to Respondent's Exhibit 14, was that the response to that request to SPEEA? A. Yes.

Q. Did meeting between the parties take place as a result? A. Yes.

Q. How many meetings occurred, Mr. Logan?

A. I recall three. There may have been another one.

Q. Were the respective positions of parties discussed at length in these conferences?

A. They were, yes.

Q. Without going into detail can you state the substance of the discussion at these conferences?

A. Both parties stated their positions, namely, the company taking the position that the discharge of Pearson was proper because it felt that his activities of the MAC both improper and illegal, SPEEA taking the contrary view in all cases. That was the substance of the discussions.

Q. This may be slightly repetitive, but I will ask you at the time these first conferences on the subject of Mr. Pearson's discharge took place, the results of the Manpower Availability [266] Conference were not known to you?

A. No, they were not.

Q. Or to the company?

A. No. I don't think we had any information on it at all, any of us.

Q. How and approximately when did these results become known to the company?

A. I was informed that Mr. Gardiner had called

(Testimony of A. F. Logan.)

Mr. Esary and given him those results. He in turn gave them to me.

Q. And some time after that, on or about March 2, 1953, reemployment was offered to Mr. Pearson? A. That is correct.

Q. Will you please state the reasons for such offer?

A. The principal reason for that offer was that we felt because of communications from and statements made by SPEEA representatives, the discharge of Pearson would tend to impair or impede the negotiations with SPEEA over a new contract, and we didn't feel that one individual or his acts should be permitted to jeopardize the contract affecting so many, and for that reason primarily we offered re-employment to Pearson to attempt to remove that one stumbling block from the negotiations and get on with the job.

Q. And the other reasons were those stated in the company's letter to SPEEA on that subject?

A. That is correct. [267]

Q. Mr. Pearson was later re-employed on or about March 17? A. That is right.

Q. After the possible or potential results of a course of action along the lines of the Manpower Availability Conference, I believe Mr. Esary stated that there were and are about 3,500 engineers in the bargaining unit represented by SPEEA.

A. That is right.

Q. Also speaking approximately, that was true

(Testimony of A. F. Logan.)

during the fall of 1952 and during the period of 1953 up to date. A. That is right.

Q. Would you say that it is easy or difficult for Boeing to obtain engineers of the type now employed in the collective bargaining unit represented by SPEEA?

A. It is extremely difficult for us to get as many as we need.

Q. Is it accurate to say that Boeing's situation during the present period and during the period of the 1952 negotiations was especially critical in this respect? A. That is correct.

Q. During this period would you say that the engineering staff at the Seattle Division of Boeing was adequate in number or inadequate?

A. It is inadequate, materially so.

Q. What effort has been made during this period to obtain additional engineers?

A. We have advertised in all effective media, we have circularized [268] schools, colleges, and sent out recruiting teams to the principal technical schools throughout the United States. We have scanned the major military bases in the country where appreciable numbers of technicians are employed in a civilian capacity. We have even gone so far as to obtain permission on occasion from commandants to contact some of those people. And, in fact, we have used every available and legitimate method that we have been able to find, and we still continue to use all of those methods.

Q. Can you describe in a general way the back-

(Testimony of A. F. Logan.)

log of business that existed during this period with respect to this Seattle Division of Boeing?

A. The backlog of committed business for the Seattle Division currently stands at almost an even billion dollars.

Q. What is the nature of that business?

A. It is heavy bombers, guided missles, gas turbines, and research, and experimental projects which are classified.

Q. In the light of that backlog of business can you describe in a general way the extent to which the company must depend upon an adequately staffed engineering department in order to meet the obligations of the company in connection with such backlog of business?

Mr. Tillman: The General Counsel objects. It seems like we are getting into matters probably upon which all the parties might wish to stipulate.

Trial Examiner Miller: Let's have the stipulation. [269]

Mr. Perkins: I think it might be quicker to put it in by question and answer and I would prefer to do it that way.

Trial Examiner Miller: Very well. I will overrule the objection, if it was intended as such.

Mr. Tillman: I will ask that this be a continuing one.

Trial Examiner Miller: Very well, continuing objection is overruled.

Mr. Perkins: What is the nature of the objection?

(Testimony of A. F. Logan.)

Mr. Tillman: I object to this as immaterial.

Mr. Perkins: And the objection is overruled.

Trial Examiner Miller: Yes.

Q. (By Mr. Perkins): In the light of that backlog, can you describe in a general way the extent to which the company must depend upon an adequately staffed engineering department in order to meet the obligations of the company in connection with such backlog of business?

A. All of our projects are technical in nature, and many of them are highly technical in nature. We simply would not be able to execute those projects without an adequate engineering staff.

Q. Is this particularly true of the aircraft industry and, if so, why?

A. It is particularly true of the aircraft industry and certain others, such as the electronics industry, because aircraft development has attained the stage now where it, the aircraft itself, is so full of electronic and related equipment, computing devices, [270] navigational devices, and that sort of thing, that the type of construction that went into a B-17, for instance, is vastly different that what we are faced with today. The engineering hours required on a present day airplane are vastly greater than those required in the beginning of World War II.

Q. At my request have you made any study of the effect upon the ability of the Seattle Division to carry on its operations in the event that the services of a substantial number of the company's en-

(Testimony of A. F. Logan.)

gineers were no longer available to the company?

A. Yes.

Q. You are informed as to the approximate number of letters sent out to other firms over Mr. Pearson's signature soliciting the attendance of representatives of these firms at a Manpower Availability Conference in Seattle? That was for the purpose of offering employment to company engineers? A. I have been so informed.

Q. Assuming that a substantial number of Boeing engineers in the SPEEA unit, say 500 were to leave the employ of Boeing at the same time, or within a short period, have you an opinion as to the effect that such a development would have upon the operations of the company's Seattle Division?

A. I believe I can state that probable effect in two ways. One, in its impact upon the projects themselves, depending on the number of engineers who left and the rate at which they left. We would have to close down one project after another so long as [271] the exodus continued. Such a procedure on our part would be reflected in the losses of millions of dollars worth of business. How many I wouldn't attempt to estimate, because it all depends upon how many engineers left and how long it took us to reorganize and either get those projects which we had closed moving again, or obtain new projects for those which had been abandoned, or cancelled by the Air Force.

Q. Would such a loss of personnel be considered by you to be one of short duration and one easily

(Testimony of A. F. Logan.)

remedied, or would you say that it would be more of an irreparable nature?

A. I would say that it might take us several years to recover from such a blow.

Q. Can you make any estimated approximation in dollars as to the cost to the company of the result of the situation that I have referred to here?

Mr. Cluck: I object to that question as going far afield, estimating problematical damages occurring from the loss of undisclosed number of employees, if they lost them.

Mr. Perkins: I am just questioning him.

Mr. Cluck: It is a speculative thing at the very best.

Mr. Perkins: I am just asking him if he could make an approximation, Mr. Examiner.

Trial Examiner Miller: I will permit the pending question to be asked, and if an approximation——

Mr. Perkins (interrupting): May I suggest that we just [272] deal with this question, please?

Trial Examiner Miller: Very well.

Q. (By Mr. Perkins): Can you make an estimated approximation in dollars as to the cost to the company of such a result?

A. Only what I said before. It would be in the millions and probably would be many rather than a few.

Q. And, therefore, impossible of approximation.

A. I don't think that we could approximate it, based upon the premise of what is going on now.

(Testimony of A. F. Logan.)

Q. You are familiar with the increase that was made in effect as to the employees, the unit represented by SPEEA, on or about March 12, 1953?

A. Yes, I am.

Q. You participated in a company decision that led to making such increase effective?

A. Yes, I did.

Q. Was the increase greater or less than the increase demanded by SPEEA? A. It was less.

Q. There are in evidence the letters that were sent by the company to SPEEA that related to the increase and the discussions that took place with SPEEA representatives on the matter of the increase prior to its being placed in effect. In addition to these letters and these discussions, did you have a discussion with Mr. Gardiner on the matter previous to placing the increase [273] in effect?

A. Yes, I did.

Q. Mr. Gardiner was the SPEEA executive chairman at the time? A. That is right.

Q. To the best of your information that is the top executive office of SPEEA? A. Yes.

Q. When did this conversation take place, approximately?

A. It was on or about the 22nd of January.

Q. It was a telephone conversation?

A. Yes, it was a telephone conversation.

Q. Can you recall the substance of that conversation, and, if so, please state it.

A. I asked Mr. Gardiner after having called him, first I called him up, and asked him if he

(Testimony of A. F. Logan.)

would reconsider the previous refusal to join the company in making an application to the then Wage Stabilization Board, to place this six per cent in effect. We discussed the matter at some length and, at least three times during that conversation I urged Mr. Gardiner to reconsider, but I was not successful in convincing him that he should do so, and so, after a thorough discussion of it, in which I went so far as to even say that we would sit back and sit on our hands while SPEEA took any credit that might accrue as merely a partial payment on their demands, and I again assured him that there was no effort on our part to embarrass SPEEA or impede the negotiations. [274] His answer remained to the negative and so that was the substance and the end of the conversation.

Q. What was the reason for the company making this increase when it did?

A. Our recruiting campaigns, particularly in the technical schools and colleges in the fall of 1951, and in the spring of 1952, and again in the fall of 1953, were showing progressively worse results as far as our ability to obtain any of these new graduates was concerned. When we got up to late '53, the results were so bad that the management of the engineering division repeatedly came to me and wanted relief with respect to our hiring rates because they stated that they had received from the college placement bureaus themselves the offers that were made by other companies and we were not able to meet those offers.

(Testimony of A. F. Logan.)

Q. (By Trial Examiner Miller): You speak of this as having occurred in late '53?

A. Let's just back away one year on all those dates. How would that be?

Q. (By Mr. Perkins): When you referred previously to 1953, did you mean 1952?

A. I was about to say if we back away about one year from all those dates, I will stick to my testimony.

Trial Examiner Miller: Very well.

The Witness: In the fall campaign of '52 then, and as they were getting ready to get into the field, in the spring of this [275] year they had had such bad results in the fall of '52, and such poor prospects of any real results in '53, that they became finally very insistent that my office do something about this, because wages and salary controls were under my jurisdiction within the company, and they were not at liberty to make these changes themselves, and so they presented some pretty blunt studies and recommendations to me which convinced me that if we were to receive any reasonable returns from these recruiting efforts we had to adjust that wage, and that is the reason why we decided to do it. And that is also the reason why we decided to do it at that time, because I had been told by the engineering management that if they didn't get relief they might as well save the money that the recruiting campaign cost and not send people out.

Q. Will you state the occurrences during the

(Testimony of A. F. Logan.)

fall of 1952, and if applicable, the early part of 1953, as to increases placed in effect by other aircraft companies on the Pacific coast?

A. There were some adjustments made by three other companies in the winter of '52-'53 and we felt the effect of the first one of those adjustments almost immediately. The Douglas Aircraft Company——

Mr. Tillman (interrupting): I object again at this point. We are getting into another field. It is quite immaterial as to what other companies did in in the way of increasing wages.

Mr. Holman: I don't think we are at all, Mr. Examiner. It is rather a competitive idea. [276]

Trial Examiner Miller: I confess that while I can see the relevancy of what other companies did as influencing a decision by Boeing, I confess that the degree of relevancy begins to get a little bit remote if the evidence sustains, will warrant a conclusion that Boeing did something because of a certain state of affairs affecting Boeing, the fact that certain other factors may have been in the situation if they involve this question of what other companies did specifically, it seems to me——

Mr. Perkins (interrupting): The intention of the proof here is to show that this is another factor that entered in timing and consideration of the company in placing the increase in effect when it did.

Trial Examiner Miller: I will permit the question.

(Testimony of A. F. Logan.)

Mr. Perkins: It seems to me it bears directly on the motivation of the respondent.

Trial Examiner Miller: Very well. I will permit the examination.

Q. (By Mr. Perkins): Will you state the names of the companies that placed in effect increases in this period? A. Douglas, Lockheed, Convair.

Q. Have you any approximate idea as to when those increases were placed in effect?

A. Approximately, Douglas at about the end of the year, the end of 1952.

Q. Did those increases enter into your determinations and [277] considerations in connection with the company decision to place in effect the increase of March 12, 1953? A. Yes, they did.

Q. Will you tell us, then, the extent to which those increases were taken into consideration and why it was felt by the company that those increases were of importance in connection with the decision to place the March 12 increase in effect?

A. Well, by the end of the fall campaign of '52 the company wasn't merely feeling that this lack of competitive position—we knew then, we had definite conclusive proof in the fall campaign that we weren't going to get recruits from the colleges unless we did something about the hiring in rate, and then later in the year, it was about the end of the year, Douglas made its adjustment, and sometime in February the other two companies made their adjustment of a like amount, and by that time I had to agree with the engineering management that

(Testimony of A. F. Logan.)

if we didn't make an adjustment we might as well not send out recruiting parties.

Q. Those companies are regarded as competitive with respect to the availability of engineers of the types in the unit represented by SPEEA?

A. They are, in that we all hire exactly the same types of engineers, utilize them.

Q. And those considerations influenced and affected your decision with respect to the March 12 increase? A. Yes, materially. [278]

Mr. Perkins: Mr. Examiner, I am about to take up the matter of the so-called gentleman's agreement, and in doing it it is not my intention to waive my position taken previously with respect to this subject.

Trial Examiner Miller: Very well, it is so understood.

Q. (By Mr. Perkins): Submitting for your examination General Counsel's Exhibit 10, which is a letter dated October 13, from the company to SPEEA, bearing your signature, and being addressed to Mr. Gardiner as chairman of the Executive Committee, which letter relates, to the so-called "gentleman's agreement", does that letter correctly reflect your concept of the so-called "gentleman's agreement"? A. Yes, it does.

Q. How long has there been an arrangement of the type that you describe in the letter that we have just mentioned?

A. I think that particular arrangement goes

(Testimony of A. F. Logan.)

back about three years, or about two and a half years, something like that.

Q. Is there any particular reason why, or explanation for, the approximate date when the arrangement came into existence?

A. Yes, there is, let us say, reasoning behind its having come into being at approximately that date.

Q. Will you state that reasoning, please?

A. During World War II we had what was referred to as the Manpower Control. It was very loosely administered but it did prevent people from jumping from job to job. And, of course, at [279] the close of the war, why, that regulation and requirement ceased to exist, and we had no particular difficulty in the period immediately after World War II, for the year or so later when the various companies started to rebuild their forces or build them higher from the level maintained after World War II, we found a lot of companies bidding against a present employer and trying to buy them away. And I say "buy" literally, because some of those offers were pretty fantastic. And we started at about a year and a half after the World War II where we had been dealing with companies, and where we knew each other, to call each other on the telephone or write each other a letter to say that, "Your employee, John Doe, wants to go to work for us. Do you have any objections?" That became a rather prevalent practice, not only among the aircraft companies but other companies, as I say, where we knew people and where we had dealt with

(Testimony of A. F. Logan.)

them. And after, I think it was about three years or a little over three years ago, we finally decided that because there still remained a good many companies that did not adhere to that practice and new companies starting up, which never had been in existence before, and were going out to obtain an engineer force by any means, at any price, that we better have a meeting of minds in some way or other on this question of pirating, as we called it. So there was some meetings held among AIA companies, some of them attended by representatives from companies not a part of AIA, and finally we arrived at a resolution which states the concensus of opinion [280] and belief of those representatives. In fact, when we were working that out we even went so far as to give consideration to a negative resolution condemning the practice of pirating. We never quite finished that. We got the positive one stating the concensus of opinion was equally effective, so a resolution was drafted and it was approved by the companies. That is the only official action that has ever been taken by AIA or any of its affiliated companies. It is a statement of principle or policy and there never has been an agreement, never has been a contract. Nearly all companies administer it differently to some respect, some greater or less respect.

Q. That is getting a little beyond the scope of my question, Mr. Logan. I will bring that out in a minute. To what extent is Boeing Airplane Company a "one customer" operation?

(Testimony of A. F. Logan.)

A. About 99.44.

Q. Who is that customer?

A. The United States Government.

Q. What branch in particular?

A. The United States Air Force. We also do work for the navy.

Q. To what extent and in what manner does the policy of the Air Force relating to salaries, wages and hiring practice affect or bear upon the company's business?

A. It bears very materially and very directly, because if we pursue policies that they do not approve, they simply reimburse us for the monies we may spend in pursuance of such policies. [281]

Q. Has the Air Force ever expressed any policy on the subject of what is referred to as labor pirating? A. Yes, it has.

Q. You are familiar with the term "labor pirating" as used in industrial circles, Mr. Logan?

A. Yes, I am.

Q. For the record will you tell us what is meant generally by the term?

A. It is meant, the practice of any employer making advances to the employees of another, or responding to advances made by employees of another with offers of employment without permitting the employer to know what is going on. Pirating means to us what you do behind the signboard or behind the bar. Don't let the man know. Steal them if you can. Buy them if you can't steal them. That is pirating as we understand it.

(Testimony of A. F. Logan.)

Q. Has the Air Force ever given Boeing a written statement of policy on this subject?

A. Yes, it has.

Mr. Perkins: Will you mark this Respondent's Exhibit No. 23?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 23 for identification.)

Q. (By Mr. Perkins): Presenting to you what has been marked for identification as Respondent's Exhibit No. 23, is that the written expression of policy to which you referred?

Mr. Weil: Mr. Examiner, I would like to object to this line [282] of questioning. I don't see what it has to do with the issues.

Trial Examiner Miller: The objection is overruled.

A. Yes, that it is.

Q. (By Mr. Perkins): This was received by the company through certain channels of the Air Force? A. That is correct.

Q. You have every reason to believe that it is the statement of the Air Force and no reason to believe to the contrary? A. That is correct.

Mr. Perkins: Respondent offers what has been marked for identification as Respondent's Exhibit No. 23.

Trial Examiner Miller: Is there any objection?

Mr. Tillman: General Counsel objects on the ground that the document is wholly immaterial to any issue in the proceeding. I would like to state

(Testimony of A. F. Logan.)

in that regard that the whys and wherefores of the origin of AIA are immaterial. All we are interested in, if at all, is the existence of AIA.

Trial Examiner Miller: May I see the exhibit?

Mr. Perkins: Yes, sir.

Trial Examiner Miller: The objection is overruled.

Respondent's Exhibit 23 will be received.

(The document heretofore marked Respondent's Exhibit No. 23 for identification, was received in evidence.)

[See page 551.]

Q. (By Mr. Perkins): And to your knowledge, the policy expressed in Respondent's Exhibit 23 had never been retracted? [283]

A. It has not been retracted.

Q. And that is true as of the present time?

A. That is correct.

Q. Mr. Logan, again on this matter of the so-called "gentleman's agreement", is Boeing contractually obligated in any way, to your knowledge, to refrain from hiring engineers from other companies, either in the aircraft industries association or out of it? A. No, we are not.

Q. And by contractual obligation I am referring both to anything in writing or anything oral.

A. We are not.

Mr. Perkins: I am not sure that the record discloses what is meant by the aircraft industries association.

Trial Examiner Miller: No, I don't believe it

(Testimony of A. F. Logan.)

does. I have some personal knowledge of it, but if you would like to have it spread on the record very briefly, why, we can.

Mr. Perkins: It seems to me that the discussion of a gentleman's agreement is hardly intelligible unless we do.

Trial Examiner Miller: Very well.

Q. (By Mr. Perkins): For the record, Mr. Logan, will you tell us very briefly what the aircraft industries association is?

A. It is a trade association, the membership of which consists of aircraft manufacturers, aircraft engine manufacturers, and aircraft accessory manufacturers. [284]

Q. Without going into the names of various members, can you give us approximately the number of companies that are included in this association?

A. Approximately eighty at this time.

Q. What is the practice of Boeing with respect to applications that come to Boeing from the employees who are at the time employees of other companies, which applications seek employment with Boeing and which applications are from personnel that would, if hired by Boeing, become members of the SPEEA bargaining unit?

A. We first acknowledge such applications and ask them if they have any objection if we contact their employer with respect to their work record there. That is the first thing we do.

Q. That would be true as to employees of com-

(Testimony of A. F. Logan.)

panies outside of the AIA as well as companies that are members of the AIA.

A. That is correct, because that is our universal practice, you might say.

Q. Assuming that in such a circumstance the employee replies to Boeing and says, in effect, "I have determined that I do not want you to contact my present employer", what is the practice of Boeing with respect to a reply in that circumstance?

A. We then reply to that statement on his part by telling him in effect, that if he doesn't want us to check his work record with his employer we have no interest in discussing possible employment with him.

Q. How long has that been the practice of Boeing? [285]

A. Oh, that has been the practice of Boeing for about 25 years.

Q. And that is prior to the time that the AIA came into existence? A. Yes.

Q. Approximately what time did the AIA come into existence, if you know?

A. I don't believe I can tell you.

Q. But you are quite sure of the accuracy of your previous answer?

A. I am quite sure of that, yes.

Q. Assuming in such circumstance that such applicant replies to Boeing and says, in effect, "I give you my approval to contact my current employer". What is the Boeing practice then?

A. We then call the employer and tell him that

(Testimony of A. F. Logan.)

the subject employee has contacted us and asks permission to negotiate with that employee for a job at Boeing.

Q. If that company at that time states to you that it would prefer that you do not negotiate or deal with that employee, or if that company refuses to permit you to negotiate with the employee, what is the Boeing practice?

A. The Boeing practice is not to conduct any further negotiations with the employee.

Q. And if that other employer replies back and gives its approval to your negotiations with such employee, what is the Boeing practice then? [286]

A. We then obtain from the employer the information that we want with respect to this person's work record, the type of work he has been doing, and the employer's estimate of the quality of that work, and then we make an employment offer to that individual based on the information we obtain about his work records and his experience.

Q. Do you conduct such negotiations as you deem advisable with the individual that is making the application?

A. That is correct. His employer doesn't appear any further in the negotiations.

Q. In the converse of the situation where the employee who is then employed by another company makes application to Boeing for a position identified with the SPEEA bargaining unit, what is the company practice as to the nature of the reply given to an employee?

(Testimony of A. F. Logan.)

A. You lost me along there somewhere. Let's hear that again.

Q. Strike the question and I will attempt to rephrase it. Let's assume that an employee of Boeing makes application to another company for employment, and I am speaking about employees of the type that are in the SPEEA bargaining unit, and such other employer then writes to Boeing or telephones to Boeing, or otherwise corresponds with Boeing and says, "So and so, the applicant, has contacted us for employment". What is the Boeing practice at that point?

A. We do two things. The first thing we do is contact the employee and see if we can find out why he wants to leave our [287] employ. If his response encompasses something that we can change or correct, we do so, and retain him in our employ.

Q. In such circumstance if you are unable to satisfy the individual or otherwise able to work out the situation, what is the Boeing practice then?

A. We then tell the other employer to go ahead and negotiate with him.

Q. How long has that practice been in effect?

A. As far back as our records go, many years.

Q. To your knowledge has there ever been an occasion at any time when Boeing has refused to permit one of its engineers to negotiate secretly with another company after first having contacted the man and having discussed the matter with him?

A. There never has been such an occasion, to my knowledge.

(Testimony of A. F. Logan.)

Q. Is your position such that you would be apt to know if any such refusal on the part of Boeing would occur? A. Yes, that is right.

Q. And this policy is well known to those members of the Boeing staff that handle engineering personnel matters? A. That is right

Q. After an employee of the Seattle Division of Boeing has contacted another employer and you have had an opportunity to contact him, and have not been successful in working out the matter with him, and he continues to desire employment with the other employer, is he then terminated by Boeing? [288] A. No.

Q. Is there any restriction or limitation placed by Boeing on his further negotiations with such other employer? A. None whatever.

Q. And those negotiations may be conducted secretly as far as Boeing is concerned?

A. That is right.

Mr. Perkins: Respondent rests.

Trial Examiner Miller: At this time we will recess for five minutes.

(Short recess.) [289]

Trial Examiner Miller: The hearing will be in order.

Cross Examination

Q. (By Mr. Weil): Mr. Logan, I would like to recall to you the conferences that were held after Mr. Pearson's discharge, that concerned Mr. Pearson's discharge, that would be the meeting of February 9, I believe, on Monday morning, in which

(Testimony of A. F. Logan.)

you and others met with Mr. Gardiner, Mr. Hendricks and Mr. Pearson. Do you recall that meeting?

A. Yes, I do.

Q. Do you recall stating at that meeting that the MAC was embarrassing the company by publicizing the labor dispute? A. I recall——

Mr. Perkins (interrupting): I object to that. I don't see the relevancy of that here. If it is an attempt to bring in the issue of publicizing a labor dispute, I think it is not the proper time, and I think it is beyond the issues in this case.

Mr. Weil: The witness testified on direct examination about the matters that took place at these meetings. I feel that if these other matters took place at these meetings that they are proper cross examination.

Trial Examiner Miller: Would you read the question to me again?

(Question read.)

Trial Examiner Miller: Objection overruled.

A. I recall making the statement in that meeting that the [290] publicity attendant upon making out the many invitations would without question embarrass the company and possibly damage it. I do not remember tying that statement in any way with the publicizing of the existence of a labor dispute.

Q. Do you recall making any statement to the effect that the company has received a large number of letters concerning the MAC and it was feared

(Testimony of A. F. Logan.)

that many engineers would be influenced against employment there as a result of the MAC?

A. I made no such statement at that meeting.

Q. Did you make any similar statement, or statement to a similar effect?

A. Are you asking me for my statement?

Q. Yes, if you made a statement of that type.

A. I made a statement that the company had received several inquiries regarding MAC.

Q. Did you at the time you made that statement show the individuals present, Mr. Gardiner and Mr. Hendricks and Mr. Pearson, a sheaf of letters you indicated were those inquiries that you had received? A. I did not.

Q. Did you show them a sheaf of letters at that time——

Mr. Perkins (interrupting): What is the materiality here?

Mr. Tillman: We can put it in on credibility alone, Mr. Perkins.

Mr. Perkins: Are you attempting to impeach the witness, is [291] that it?

Mr. Tillman: We have some information that Mr. Logan did do that. He is denying it.

Mr. Perkins: It seems to me that there is a rule on impeachment on a collateral matter.

Mr. Weil: I don't feel that that is a collateral matter. And apparently the main objection of the company to the MAC was the possibilities of damage to the company by the working out of MAC as it was planned. The matter about which I am

(Testimony of A. F. Logan.)

asking was a matter concerning that damage to the company, concerning the company's fear of that damage, and the possibility that it exists, and I don't see that it is immaterial.

Trial Examiner Miller: I will overrule the objection.

Q. (By Trial Examiner Miller): The pending question is whether you had or showed to any of these individuals during the course of this conversation a sheaf of letters. A. I did not.

Q. (By Mr. Weil): You stated in your direct testimony, Mr. Logan, that you learned that adjustments were made by other companies, including Douglas, Lockheed and Convair, Douglas late in December or near the end of the year, and the other two companies in February. Can you tell me what was the amount of the adjustments that those companies made?

A. I was told that it was 6 per cent.

Q. On each case? [292]

A. Yes, in all three cases.

Q. Was it your intention to follow those adjustments by a similar adjustment then?

A. No. We had determined on the amount of our adjustment months earlier than that. We weren't following. We apparently were leading, as far as I know, if there was any relationship at all.

Q. On direct examination concerning the gentleman's agreement, Mr. Logan, you stated that the diverse companies met and worked out this reso-

(Testimony of A. F. Logan.)

lution. When was that meeting? When did that meeting take place?

A. I don't know. Three and one half years ago. I could dig it out of the record.

Q. Were you present at the meeting?

A. Yes.

Q. Did you represent the Boeing Airplane Company? A. Yes, I did.

Q. What was the text of that agreement?

A. Well, in the first place, there wasn't any agreement.

Q. That resolution?

A. I don't think I can tell you. I don't remember the precise wording of it after this length of time.

Q. Do you have any records from which you can take that?

A. I might be able to. I wouldn't even be positive in that.

Mr. Perkins: I think I have it right here. [293]

The Witness: That is fine.

Q. (By Mr. Weil): Mr. Logan, I am handing you this letter which your counsel furnished me. The paragraphs numbered one and two are the substance of that resolution?

A. Yes, that is the substance of it.

Q. Would you read that into the record, please?

Trial Examiner Miller: You are asking that be done in lieu of the actual physical submission of the document as an exhibit?

Mr. Weil: Just those two paragraphs.

Trial Examiner Miller: Very well.

(Testimony of A. F. Logan.)

Mr. Perkins: I must object to this again, Mr. Examiner, on the ground of materiality and relevancy, and mindful of your statement that if something particularly came along that it would be appropriate to invite it to your attention, it seems to me that if there is any issue on this point at all which I question, that there is no multiple employer unit involved in this case, and the matters that are important to the Trial Examiner and to the Board are the acts and the practices of the respondent herein involved. And I, therefore, on that ground challenge the materiality of evidence of this type. I think it is highly prejudicial as possibly indicating some other kind of a practice on the part of the respondent than is reflected by the evidence here.

Trial Examiner Miller: Since the immediate problem is [294] whether or not the particular paragraphs should be read into the record, and since I am unable to evaluate the objection without looking at the paragraphs, I will ask to have an opportunity in that respect.

Mr. Cluck: On direct examination this specific meeting on this specific resolution was referred to, so that counsel has already made his choice as to the prejudicial or non-prejudicial nature of the reference.

On cross the question is simply as to the time and place where the resolution was adopted, and then what the results of it were. The witness already has indicated that this letter embodies the

(Testimony of A. F. Logan.)

terms of the resolution, so, in effect, it simply makes explicit the general reference to the resolution already referred to on direct examination.

Trial Examiner Miller: I did indicate at an earlier point in the proceeding that what then appeared to me to be relevant was the interpretation based upon the so-called "gentleman's agreement" by the Boeing Aircraft Company as bearing upon its motivation for taking certain action with respect to Mr. Pearson and the MAC. And I believe the record will show that I made some remarks at the time to the effect that precise proof as to what the agreement, if there was any, consisted of, would not necessarily be material since the evidentiary factor would be what Boeing believed to be involved as bearing upon its motivation. [295]

Mr. Cluck: May I add two related points directly to what the Examiner has said?

First, the prior ruling was made upon the objection made by respondent to General Counsel's efforts to get the contents of the agreement, or at least the manner in which Boeing reacted to the subject-matter, into evidence.

Now, however, the issue is presented differently, because respondent himself has opened this subject up on direct examination of his own witness, and, therefore, we are confronted with the different question as to whether it isn't proper cross examination for us to have the contents of the resolution referred to on direct examination.

(Testimony of A. F. Logan.)

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Let the record show that during the period of the off-the-record discussion there was extensive discussion of the Trial Examiner's previous remarks and ruling on the General Counsel's line of examination dealing with the so-called "gentleman's agreement", and the position of each of the parties involved with respect to examination along that line. The Trial Examiner has taken cognizance of the arguments presented by counsel before we went off-the-record, and during the period of discussion off the record, with respect to their respective positions on the matter now in issue, namely, the specific quotation from the [296] letter identified by the witness. I am satisfied on the basis of the matter appearing in the record, and the entire state of the record up to this point, that the objection should be overruled.

The Witness: Paragraph one: "Advertising for employees in cities where member companies are located elsewhere unless the member company or companies located in the particular city so agree."

Paragraph two: "Offering employment to employees working for other member companies unless member company where applicant is currently employed so agrees. This applies to offers made either directly or through sub-contracting companies or employment agencies."

Q. (By Mr. Weil): Would you read the intro-

(Testimony of A. F. Logan.)

ductory two lines that preceded those two paragraphs?

A. "There is no middle ground that will cure this problem. Pirating must be discouraged and to that end the following practices are condemned".

Q. Mr. Logan, has it been the practice of the Boeing Airplane Company to conform its policy to that policy as set out in that resolution?

A. Having had my most recent look at that resolution, I will frankly tell you I don't know what paragraph one means, so I can't answer your question.

Trial Examiner Miller: Off the record. [297]

(Discussion off the record.)

Trial Examiner Miller: On the record.

Q. (By Mr. Weil): Let me rephrase that question. Has it been the policy of the Boeing Airplane Company to conform its practice to that policy as set forth in paragraph two of the resolution?

Mr. Perkins: I believe the witness has already testified as to the practice of the company.

Trial Examiner Miller: I will permit the question to stand.

A. Yes, that is our policy.

Q. (By Mr. Weil): Mr. Logan, I am handing you Respondent's Exhibit No. 23, which is the Air Force letter to which you referred earlier. Is it the practice of the Boeing Airplane Company to conform its policy to all five of the recommendations set forth therein?

(Testimony of A. F. Logan.)

A. Yes, it is our policy to subscribe to all of those items.

Q. I don't seem to have asked you what the place was at which that AIA meeting took place. Where was that meeting held?

A. In Los Angeles, California.

Mr. Weil: That is all.

Trial Examiner Miller: Mr. Cluck?

Mr. Cluck: No questions.

Mr. Perkins: No questions.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Trial Examiner Miller: Does the respondent have any further witnesses?

Mr. Perkins: No.

Trial Examiner Miller: Is there any rebuttal on behalf of the General Counsel?

Mr. Weil: May we have a 5-minute recess?

Trial Examiner Miller: We will have a short recess.

(Short recess.)

Trial Examiner Miller: On the record.

Mr. Perkins: I should like to ask the witness one question, if I may, that was on the stand before we rested.

Trial Examiner Miller: Very well. Would you resume the stand, Mr. Logan?

A. F. LOGAN

resumed the stand, having been previously sworn, and testified further as follows:

Redirect Examination

Q. (By Mr. Perkins): Mr. Logan, is there any question that was propounded to you on cross examination, or any answer given by you on cross examination, or anything in the resolution that was referred to that would indicate to you any reason for qualifying or changing any of your answers to the questions propounded to you on direct examination by counsel for respondent?

A. Nothing whatsoever. [299]

Mr. Perkins: That is all.

Trial Examiner Miller: Is there anything further?

Mr. Weil: Nothing further from General Counsel.

Trial Examiner Miller: You may be excused.

(Witness excused.)

Trial Examiner Miller: During our recess, Mr. Perkins, you indicated that you might want to reconsider your decision to rest on behalf of the respondent.

With the further appearance of Mr. Logan on the stand, what is your present disposition on that matter?

Mr. Perkins: Respondent rests.

Mr. Weil: No rebuttal.

Trial Examiner Miller: Are the parties prepared at this time to argue orally or do you wish a further recess?

Mr. Weil: I am prepared to argue to a limited extent, the only extent to which I was prepared today.

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

At this time, before proceeding to the oral argument, the course of which was discussed during our period of discussion off the record, I should like to recapitulate for the the record my understanding with respect to the situation in regard to the exhibits.

My notes show that General Counsel offered in evidence 19 [300] exhibits. All of those exhibits have been offered in duplicate and my notes show that all of the exhibits were received in evidence.

Does that statement correctly reflect the understanding of the parties?

Mr. Tillman: That is right.

Mr. Weil: That is correct.

Trial Examiner Miller: Should our mutual recollection and my notes be in any respect in error, I will at this time state for the record that General Counsel's 1-A through 1-I, inclusive, and General Counsel's 2 through 19, inclusive, are hereby received in evidence.

My notes show that the respondent company offered 23 exhibits in evidence, and that all of them were offered in duplicate. My notes also show that all of the 23 exhibits were received in evidence.

Does that gibe with the recollection of the parties?

Mr. Tillman: Yes.

Mr. Perkins: Yes, I believe that is correct.

Trial Examiner Miller: Should our mutual recollection and my notes be in any respect in error, I will at this time state for the record that Respondent's 1 through 23, inclusive, are hereby received in evidence.

I am prepared at this time to hear oral argument. I had some indication during one of our recess periods that the General [301] Counsel would require no more than a half an hour for the purpose of presenting such oral argument as he is prepared to give at this time.

In order to provide a working guide, we will set one half hour at the top limit tentative to see how we can work it out.

Go ahead, Mr. Weil.

Mr. Weil: I should like first to point out that the evidence not in dispute supports the allegations of the complaint.

Let us examine the pertinent, relevant facts which constitute the violations.

First, there has been a long period of fruitless bargaining ending in an impasse. During the course of bargaining the members of AIA became disturbed and upset and caused their bargaining team to take up with the employer the problem of the gentleman's agreement of the AIA, because they felt that that gentleman's agreement was an infringement upon their right of freedom of movement within the framework of their profession, and

that it was an undue restriction upon that freedom to sell their services to the highest bidder.

The members of SPEEA through their Action Committee, through their Executive Committee and through meetings, as a body evolved what was to become known as the MAC, which was evolved for three separate and distinct purposes.

The three-fold purpose of MAC has been completely covered in testimony which was uncontroverted. The MAC was designed to [302] restore the freedom of movement, and the freedom of the membership to sell their services to the highest bidder. In other words, to restore an element of competition to the engineering labor field which the members felt had been restricted by the gentleman's agreement.

Second, the MAC was designed as a pressure tactic to break the impasse that existed, and to force the company to give further consideration to the arguments of the SPEEA negotiators.

And, third, and finally, I would hesitate to say less important, the MAC was designed to supply data which the members of the SPEEA felt would help both the company and SPEEA in evolving the extent to which raises and improvement of working conditions should be granted by the company.

Therefore, it seems quite plain that the MAC was an activity undertaken by the members of SPEEA in support of their bargaining position. It was also an activity undertaken by the members of SPEEA as a concerted activity to aid and assist each other

in many respects, each of those respects which I set forth.

The discharge of Mr. Pearson brought the question of the MAC to a head. The discharge of Mr. Pearson by the facts adduced in this hearing, by the pleadings in this hearing, is shown to have been a result of his acting on behalf of SPEEA in running this conference, and the result of nothing else. The factual reason given by the company as to his discharge shows that his [303] discharge resulted only from the fact that they considered this as a SPEEA activity. This discharge must necessarily be an unfair labor practice if the MAC was a protected, concerted activity. I believe there could be no doubt that it was a concerted activity.

The question and the major issue in this case remains was it a protected, concerted activity?

Now, protected, concerted activities are spelled out in the Act, Section 7, which states employees shall have the right to self-organization, to form, join or assist labor organizations—note that word to "assist"—to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The activity of the MAC certainly was the activity of a labor organization, and Mr. Pearson's participation in that was within the meaning of Section 7, assisting his labor organization to which he belonged. That is to say the MAC was a form of concerted activity engaged in which SPEEA, for the purpose of collective bargaining first, that

is, in the respect in which it was expected to supply data and to put pressure upon the company, and for mutual aid and protection for the members of SPEEA, and in that respect the function or purpose of MAC was to restore the freedom of movement, freedom to bargain for their services which the employees had been infringed by the [304] AIA.

There has been considerable litigation concerning protected, concerted activities, naturally, which activities have and have not been protected. Perhaps the leading case in the field is the case of National Labor Relations Board vs. Peter Kohler, Swiss Chocolate Company, Inc., 33 N.L.R.B. 1170. This was reviewed by the Second Circuit with a decision to be found in Volume 130, Federal (2nd) 503.

In this case the union member published a union resolution condemning actions of the employer. In fact, he brought this resolution about and caused it to be published and was discharged. The second Circuit said, and I quote, "So long as the activity is not unlawful, we can see no justification in making it the occasion for a discharge. A union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others to whom it may wish to win to its side. Such activities may be highly prejudicial to its employer. His customers may refuse to deal with him. He may incur the enmity of many in the community whose disfavor will be hard on him. But the statute forbids him

by discharge to rid himself of those who lay such burdens upon him."

The test there taken by the Second Circuit was the test of the illegality or unlawfulness. That test has been followed by the Board and by the courts ever since. Sometimes it is [305] claimed to the point of absurdity, but nevertheless it has been followed.

The question arises, then, was anything in the MAC unlawful? And I submit that there is nothing about the MAC which is unlawful under any law of this United States. It is possible that in some jurisdictions there may be state laws that would forbid or possibly local laws that would forbid this, but the fact that an action is unlawful under state or local ordinances, as the Board said in the American News Company case, 55 N.L.R.B. 1302, and I will quote directly, "We think it most unlikely that Congress intended to exclude from the concerted activities protected by Section 7 all conduct deemed tortious under state rules of decision or statutes or city ordinances merely because of the objective sought to be accomplished."

Now, in many cases the course and boards have found that the activities indulged in by the unions have been unprotected, concerted activity.

If we take a look at these cases we can easily see why the courts and the boards have so found. The leading case there is the Fan Steel case, which is to be found at 306 U.S. 40, in which the Supreme Court found an activity unprotected. This activity was the illegal seizure of the Fan Steel plant by

a sit-down strike. The Fourth Circuit in the Clinchfield Coal case, which is found at 145 F. 266, followed the ruling in a similar illegal seizure case.

Also, the Fourth Circuit in the case involving the Draper Corporation, 145 Federal (2nd) 199, found that a wildcat strike was unprotected. This strike was in direct contravention of a union's agreement not to strike.

However, the Sixth Circuit said that even that was going too far in the Kalamazoo Stationery Case, found at 160 Federal (2d) page 465, where they held a wildcat strike to be a protected concerted activity. This was in 1947. The prior case in 1944.

In the Sands Manufacturing Company case, the Supreme Court, citation 306 U.S. 332, extended this doctrine slightly, if it can be called an extension, by finding that action which resulted in a breach of collective bargaining contract was unprotected.

But there, you see, the breach was a breach of the law of the land, the law of contract.

Similarly in other cases it has been found a mass picketing is not protected, concerted activity, coercive picketing, strike to violate a Board's certification or to cause an employer to violate a Board's certification, and similar activity of a vicious or violent or unlawful nature.

More recently the Board has held to this same theory and the courts similarly, that in order to fall in to the ranks of unprotected activity, the concerted actions taken must be illegal, unlawful, or

of so serious and flagrant a nature as to render the employees participating unfit for service to their employers. [307]

I don't believe that respondent claims that Mr. Pearson was engaged in activity of so serious a nature that it rendered him thereafter unfit for employment, otherwise I think they would not have reemployed him.

I think after a view of the record and of the authorities that there can be little doubt that the activities engaged in in this case were protected. That being the case, the discharge of Mr. Pearson would have been a violation of Section 8 (a) (3) of the Act.

It is the General Counsel's contention that by this violation of the Act, the further—or the impasse then in existence became tainted with a taint of bad faith. The General Counsel has carefully taken no position as to whether the bargaining prior to this time has been so tainted, was so tainted, by the activities engaged in by the course which bargaining took. It may well be that the bargaining, the impasse reached from the time it was reached was tainted with bad faith, but the General Counsel does not rely on that, but merely asserts that from the time of the discharge of Mr. Pearson, which was taken and had the effect of supporting the company's desire to have no more of such activities as the MAC, from that time on the impasse was definitely tainted. And in the face of that tainted impasse, respondent went ahead and instituted a unilateral increase in wages which

respondent explains was necessary in order to insure their obtaining their full share of the supply of new [308] engineers coming out of school.

Then the quite recent case of the City Packing Company, found at 98 N.L.R.B., No. 203, the Board said, in essence—I am not quoting directly—that an impasse does not justify unilateral changes and conditions of employment when good faith is lacking, since the impasse might otherwise not have occurred.

It would be pure speculation to say that the impasse would have been broken or would not have been broken, but I don't feel that by the company's refraining from taking the action which they did in response to the MAC, I don't feel that that inquiry is necessary. The company did take that action. And in the face of an impasse which I contend at that time was bad faith, instituted this unilateral wage increase for the purpose I mentioned, which is all covered by the company's witnesses' testimony.

Trial Examiner Miller: Is this the theory on which you seek to avoid the Justice Burton's dictum in the Crompton Highlands Case?

Mr. Weil: Yes.

Trial Examiner Miller: Go ahead.

Mr. Weil: The respondent's witnesses did not state in what respect they expected that the granting of the 6 per cent increase of a retroactive pay increase for overtime would help in hiring new employees. I believe that that shows possibly that there may have been other reasons than the com-

pany gave for [309] instituting this wage increase, and these other reasons may have very well have been, and I believe that they were, to undercut the union's negotiating and to make it impossible for unions to continue to negotiating effectively at that time.

Mr. Perkins: If there is any question about there being evidence on that point, I ask leave to reopen the case and present evidence on it. I don't think there is an absence of evidence on that point, however. It certainly was my intention to adduce evidence on the point.

Trial Examiner Miller: Of course, in effect I may be put in a position where expressing an opinion on the subject—I am expressing a factual finding right here and now.

Would you read Mr. Weil's last statement to me again?

(Statement read.)

Trial Examiner Miller: Off the record.

(Discussion off the record.)

Trial Examiner Miller: On the record.

Go ahead, Mr. Weil.

Mr. Weil: Finally, and briefly——

Mr. Perkins (interrupting): Excuse me for the interruption, Mr. Weil.

Mr. Weil: That is quite all right.

I want to draw attention to the factor of Mr. Logan's refusal to permit the appropriate members of SPEEA to be present at the interview in which Mr. Pearson was discharged. I think [310] there could be not a better example of the manner in

which the company went behind the union than this.

Mr. Pearson made it plain that he considered his activities to be union activities, and in view of the fact that the company had been given all the facts concerning the MAC right in the inception, I don't see how Mr. Logan could have had any doubt in his mind that this was a union activity. Nevertheless, Mr. Logan refused to allow Mr. Pearson to have these individuals present and discharged him on that occasion. This undermined the union's authority and certainly had the probable effect of so doing, and showed an additional indication of the company's refusal to bargain.

That is all I have to say at this time.

Trial Examiner Miller: In considering the question as to whether or not the MAC involved a protected, concerted activity, has the General Counsel had occasion to consider the significance, if any, of the case involving Metal Moldings Corporation, 397 N.L.R.B. 107, and the action with respect to that case in the Court of Appeals for the Sixth Circuit?

Mr. Weil: Offhand, I don't recall that case.

Trial Examiner Miller: The case was a situation in which in the midst of an active union campaign one of the employees, who was an active union supporter, was discovered to have engaged in activities which may be summarized roughly as follows: As one of the employees engaged in metal polishing, this [311] particular individual advised a number of his fellow metal polishers that his father was a foreman of the polisher's department at a com-

peting firm, and that they would be well advised, if dissatisfied at Metal Molding, to seek employment with his father. The Board upon accessing all of the relevant evidence found that such remarks had been made by the employee, but apparently came to the conclusion on balancing all of the evidence that his activities in that regard, although known to the company, were not the determining factor in connection with his discharge, but that he was in fact discharged for his activities on behalf of the union organization which he supported, over and above whatever he may have done by way of remarks of this type to fellow employees. The Board's order for reinstatement and back pay was reversed by the Sixth Circuit in a decision which is not reported in the Federal Reporters Service so far as I know, but which is reported at 12 Labor Relations Manual 723. And as I understand it, the Sixth Circuit took the position that an individual who was engaged in "recruiting" employees for a competitor, and who was discharged for that reason, had been properly discharged. The precise way they put it leaves some doubt as to whether they were holding that that type of activity warranted discharge under any circumstances, or whether they were holding that in the face of such proof, substantial evidence of anti-union motivation was lacking. I call the case to the attention of the parties.

I am wondering if the General Counsel has considered it and has any comment.

Mr. Weil: Yes. I didn't recognize the name of the case when you mentioned it. I have considered

that case. That case, incidentally, I should have brought it out because it brings to light a fundamental disagreement on facts that seem to exist in this case, in our present case. That is to say, that case concerned an individual who made it his business, or attempted to make it his business, to take employees away from his company, and to send them to another company. This case is not only comparable to that case, it is distinguishable on this basis, the MAC is not the action of an individual coming in here and asking 500 engineers to go to work for somebody else. The MAC is 500 engineers getting together and saying, "We would like to go to work for somebody else. Let's look for somebody else who will hire us." It is a concerted activity.

Mr. Examiner, in the case, Metal Moldings case, that was not concerted activity. Whether it was protected or not, it wasn't concerted, because this individual did this on his own hook. It wasn't the employees, it was not a movement from within as I think we have shown the MAC to have been. Nobody asked these people to leave Boeing's employ. And the statements made in the letters which are in evidence indicate that the SPEEA at least had the concept that under the circumstances of such a conference, probably Boeing would find it necessary to [313] become competitive. If it was not competitive, nobody would leave Boeing. They have asked—come to SPEEA and asked SPEEA to have a conference by which they can leave Boeing's employ. It is a fundamental difference, as I

see it, and it is the basis on which the concerted activity should be protected. Surely it is no different than the union setting up its hiring hall or setting up some form of an employment office, which is not unusual.

Trial Examiner Miller: Very well.

At this time we will recess for five minutes.

(Short recess.)

Trial Examiner Miller: On the record.

The hearing will be in order.

Mr. Cluck.

Mr. Cluck: In the interest of brevity, Mr. Examiner, unless this hearing goes over a half hour or some period of that sort, where there is a decision to submit or rebuttal, if it does, we will submit it by written brief.

Trial Examiner Miller: Very well.

Mr. Perkins.

Mr. Perkins: Mr. Examiner, the complaint alleges negotiations between the employer and the union here involved that extended through the better part of 1952 into the spring of 1953. It alleges that the parties were unable to reach a mutual agreement as a result of those negotiations. It then alleges the [314] discharge of one of respondent's employees.

Simply stated, the essence of the complaint is that the nature of that discharge was such that the discharge of one individual impinged upon the collective bargaining negotiations between the parties, and that from and after the discharge of this single

individual that the bargaining thereafter became bargaining in bad faith.

Primarily, as I understand it, because the discharge of the individual was contended to be wrongful, and because there was no bargaining in turn with respect to the discharge of the individual, and that thereafter, despite the fact that the individual involved was re-employed, the entire course of negotiations on the basic contractual issues between the parties became irreparably tainted and irreversibly tainted to the point that the unilateral increase that was placed in effect by the employer is, it is contended, automatically an evidence of bad faith on the part of the employer.

The answer admits the negotiations and the discharge of the individual, and the unilateral increase, but takes the position on the part of the respondent that the discharge was proper and for cause, that, therefore, there is no effect of the discharge upon the collective bargaining negotiations; that in any event, the incident of the discharge did not impinge upon the contractual negotiations between the parties; that the course of procedure followed by the employer throughout the negotiations was [315] proper; and that the action taken by the respondent in connection with the unilateral increase was not motivated by any clandestine and unspoken feelings of animosity toward the union, that the unilateral increase was not placed in effect with any intention of affecting or disparaging the prestige of the collective bargaining agent here involved, but rather that the unilateral increase was

placed in effect by reason of a business situation which rendered it a compulsory matter in the eyes of the company on the basis of the company's business situation at and prior to the unilateral increase taking place.

Now, with the parties in those respective positions, the General Counsel contends that the discharge of Mr. Pearson is improper. The respondent, of course, contends that it was proper. And it seems to me very clear that if we were dealing with an individual situation here, and it were found that an employee identified himself positively with a movement intended to bring pressure and to present potential damage to the company, and permitted his name and his signature to be used in that connection, and was, in effect, in charge of the movement, and had taken overt steps in connection with the movement, and the movement was under way, that an employer unquestionably would have the right to discharge the employee for cause. But it is said that the employer does not have that right in this circumstance because Mr. Pearson's activities, the individual here involved, were concerted, and that for that reason those activities fall [316] within the scope of Section 7 of the Act and, therefore, a violation of Section 8 (a) (1) necessarily results.

Before taking up the matter of alleged violation of 8 (a) (1), I would like to address myself briefly to the contended violation of Section 8 (a) (5) momentarily.

It is contended here that the employer refused

to bargain on the matter of Mr. Pearson's discharge. If that discharge was discriminatory, and I say that then I think that there may be some serious question as to any duty to bargain under the circumstances. If the discharge was not discriminatory, then respondent's position with respect to that discharge is that respondent discharged its duty to bargain in connection with the discharge, and the point there is that the subject-matter, and the scope of the possible bargaining is so limited as to preclude anything but a statement of the respective positions of the parties.

There were lengthy discussions in which the respective positions were stated, and there is no question but that there was an adequate opportunity for both parties to state their respective positions in detail, and having stated those positions there was no change in the attitude of either, and for that reason it seems obvious that the duty to discharge Mr. Pearson, the duty to bargain with respect to Mr. Pearson's discharge, was met and exhausted by the parties.

Now, if the duty to bargain was completely met, let us say, [317] by both parties here with respect to the discharge of Mr. Pearson, I think that there is a very serious question as to whether you have any possibility of an 8 (a) (1) violation in the case as a matter of law, not as a matter of fact, because if it is a bargainable issue, it would seem to follow logically that bargaining or exhausting the bargaining process would be futile if it can then be claimed after the discharge of the bargaining duty on both

sides that the discharge is nevertheless discriminatory.

Now, passing that argument on the point of law, it is contended that the company's discharge of Mr. Pearson, which after all is the crux of this case, every contention stems back into that discharge, passing that argument and going to the matter of whether the Manpower Availability Conference was a protected, concerted activity, I am simply going to summarize our position very briefly because time will not permit too great an elaboration on the point. I am not going to discuss the facts of record with the Trial Examiner because he has been here with us and has paid close attention, as we all have, to the evidence as it was adduced here.

I will simply summarize respondent's view of the evidence with respect to the Manpower Availability Conference by saying that it unquestionably was a device conceived in lieu of a strike, that the very essence and objective of a strike is to inflict as much damage upon an employer as possible. A strike [318] is referred to as economic warfare. It is that. And the right to strike is recognized and preserved expressly in the Act. But, nevertheless, taking the evidence by its four corners in this case, it was quite apparent that the members of SPEEA were disinclined to strike. They were seeking a method whereby they could keep their positions, continue their income, jeopardize their salaries in no way, and yet by threatened damage to the company force the company to a position where the company would accede to the contractual demands of SPEEA.

I think to characterize the Manpower Availability Conference as more or less of an information center, as some kind of a hiring hall, device to make engineers available and adjust the marketing, the market position of engineers throughout the industry, is not too realistic in this case, when the record is reviewed as to the manner in which the MAC was developed, the reasons why it was developed, and the stated objectives in connection with its development.

As to whether it was simply a planned meeting where information would be collected, I could refer the Trial Examiner to many places in the record, but I invite attention particularly to the language of the letter that was entitled "Are you in need of additional engineers", and went out over Mr. Pearson's signature, as follows:

"The purpose of the conference was to put employers of engineers in contact with those of our members"—I emphasize [319] this—"who are available for new positions."

"A distinction between men"—and I emphasize this following—"who are actively seeking new connections and those whose interest is more intent upon the advantages of other situations will be noted in the makeup of the graphs."

And then, "Over 500 engineers, scientists and industrial mathematicians are pledged to attend the conference"—I am skipping. "These representatives of the employers solicited should come"—and I emphasize the following—"prepared to make firm offers when they interview engineers meeting their

requirements. It is planned next that the conference will be self-liquidating for this reason, each company will be asked to pay a registration fee of $25 and an additional fee of $10 for each engineer hired as a direct result of the conference."

On the graph attached to the letter the black columns are stated to represent, and I quote, "Engineers planning to leave present employment", and the white columns are said to represent engineers who seek a more attractive situation.

Our contention with respect to the position of General Counsel that the MAC was a protected and concerted activity is something like this: To the extent that it was not brought in the nature of pressure against the company in lieu of strike, and to the extent as it has been contended that it was a means of bringing people together, a means of distributing information, I think that there is a serious question as to whether it is [320] concerted activity. I can spend quite a bit of time on the matter of what is concerted activity. Does it mean concerted activity to a given employer? Is there anything illegal about an employer, for example, discharging one of his employees who at the same time is working as, let's say, the manager of an office for another union, which latter union has no possible connection with the employer?

Supposing that a group of employees decide collectively and concerted that they wish to work for some company that is entirely unrelated to the employer, and the employer determines that he doesn't desire that they handle those jobs at the

same time for reasons of his own. I question seriously whether that can be concerted activity within the meaning of Section 7.

But getting to the matter of whether it is protected, and assuming for argument that it is concerted to the extent that it is in lieu of a strike, respondent's position is threefold.

First, it is illegal. It represents a rejection of the bargaining principle in that it was identified with a movement of employees away from the employer.

Secondly, it was indefensible within the meaning of the various cases that are on that point.

And, thirdly, that it was not protected because it was identified with a rejection of employment. It was in that direction. It might be not in that direction up to the time, or during the period it was simply a threat, but once it was put [321] in motion, once the letter went out, we consider it to be identified more closely with an abandonment of employment than simply a threat to quit. It was an active movement going out, seeking on the basis of the language that I have mentioned here from that letter, to other employment.

The individual here involved who centers in the single incident is the crux of this case, was the individual who was in charge, and was the individual who permitted his name to be put on the instrument which was the most important instrument in connection with the activities of the Manpower Availability Conference.

I will conclude by saying that I don't think that

the law, that the intention of the law is, and I hope it is not, that an employer must be compelled to finance an action which is in lieu of a strike, and if such action were carried to its intended objective could be possibly many times more damaging than a strike.

If the Trial Examiner has any questions on any specific point that has come to his mind, I would be happy to try to answer.

Trial Examiner Miller: I think you have adequately covered the subject from the point of view of the questions that I might have had in mind.

Mr. Cluck.

Mr. Cluck: I will submit argument on brief.

Trial Examiner Miller: In due course the Trial Examiner will prepare and file with the Board his Intermediate Report and recommended order in this proceeding, and will cause a copy to be served on each of the parties. Upon the filing of the report and recommended order, the Board will enter an order transferring this case to itself, and will serve a copy of the order, setting forth the date of the transfer, upon all the parties. Service of the intermediate report and the order will be complete upon mailing. At that point, the Trial Examiner's official connection with this case will cease.

The procedure to be followed before the Board thereafter, with respect to the filing of exceptions to the intermediate report and recommended order, the submission of supporting briefs, requests for oral argument before the Board, motions addressed to the Board and related matters, is set forth in the

rules and regulations of the Board. Relevant excerpts from the rules and regulations in that connection will be supplied when the Board's order transferring the case to itself is served upon the parties involved in the case.

Is there anything further to come before the Examiner? Since there are no further matters to be heard at this time——

Mr. Perkins (interrupting): Is it appropriate to talk about briefs? I believe the rules say that that matter should be discussed before the conclusion of the hearing. I have informally expressed myself to the Trial Examiner in the presence [323] of the General Counsel along the line that the respondent would hope for more time than I believe you can allow us, Mr. Examiner, under the rules.

My reasons for that are that we are not going to be able to get a record here for five days. The briefs have to be in San Francisco three days before the expiration of the twenty days, so that when you get through we have got about a net of twelve days, ten or twelve days.

Trial Examiner Miller: It is true, I had neglected to spread our discussion about briefs on the record. We did have discussion about briefs. At this time all counsel are aware all I can do under the rules and regulations is to allow the 20-day period allowed by the rules. However, I did indicate off the record that my own situation insofar as my assignments are concerned, is such that I had no doubt but that the Associate Chief Trial Examiner, if advised of the need for an extension of time would sympatheti-

cally consider any such request. I indicated off the record that I could not at this time give any guess as to how much of an extension would seem to be appropriate, but, of course, you are at liberty to request that extension for whatever period of time seems to you to be appropriate, and I can assure you that any requests for an extension will be sympathetically considered. That is about all I can say.

Mr. Perkins: Thank you. And the 20 days is now granted?

Trial Examiner Miller: Yes. [324]

Since there is nothing further to come before the Examiner in this hearing, the hearing is now closed.

(Whereupon, at 4:35 o'clock p.m., Thursday, June 25, 1953, the hearing was closed.) [325]

GENERAL COUNSEL'S EXHIBIT No. 2

The following is submitted to SPEEA members to determine whether or not such punitive action by SPEEA is desired at this time. Study This, then turn in your ballot to your Area Representative.

Our Pro & Con Committee had no comments.

Introduction

The Manpower Availability Conference is conceived as a "market place" where Engineers who seek more desirable employment can meet with Companies which seek to hire more Engineers. There are three major reasons for sponsoring such a conference; namely, to help those Engineers de-

siring to move to obtain the best competitive offer, ot help to discover the true market price for Engineers, and as a punitive action to reduce the Engineering services available to Boeing.

General Plan

First, signatures of Engineers who pledge themselves to attend such a conference will be obtained through the Area Representatives. A few items of personal data, such as years of experience, will also be obtained for submission to the invited Companies to serve as an inducement. Area Representatives will keep this information confidential. If membership response is favorable, a letter will be written and mailed to every Company we know of in the country which employs Engineers. Perhaps ads could be inserted in the "Positions Available" columns of newspapers in a number of leading cities, inviting inquiries of SPEEA. Next, a date would be set for the conference and arrangements made for the interviews with those Companies who accept our invitation. After the conference, each Engineer who was interviewed would be asked to drop a card bearing his present salary and the increase offered into a box. This information would then be summarized and circulated to all Boeing Engineers. A summary of the experience of persons hired by the participating Companies could be made and circulated to all of the other Companies on our mailing list. It is expected that this information would excite the interest of both groups. Another conference could then be called and the procedure

repeated. This conference should be sufficiently unusual to be newsworthy and could thus aspire to considerable free publicity. This publicity in turn would have a further punitive action to discourage new hires from coming to Boeing.

A number of questions may arise. First, "What if the Conference doesn't work?" There is little purpose in conjecturing about success of this item. If only ten Engineers pledge to attend or if only one Company accepts our invitation, the conference will obviously fall far short of expectations and might be called off. All we would have lost in that eventuality would be some work and printing cost. We will never know for sure, though, unless we try. As a point of interest, however, several Companies have been sounded out and they all have indicated unofficially that they desire to be included. Second, "Is it ethical?" There is nothing unethical about providing a time and a place for these two groups to get together. After all, it is Boeing policies which provide the impetus for a change, not SPEEA. Anyway, Boeing has set the ethical standard with their Gentlemen's Agreement. Third, "Won't the Gentlemen's Agreement of the Aircraft Industries Association be a hinderance?" Possibly, but we have a method which might get around that for some Engineers, namely, expressing willingness to AIA members to notify Boeing in advance of plans to seek employment elsewhere. At any rate, we might be surprised at the variety of Companies who are sufficiently interested in our qualifications to make attractive offers. Fourth question, "What if

the Company finds out about the Conference?" It would be our intention that they find out well in advance, when some invited Companies send them our letter, if they haven't learned of it sooner by word of mouth.

Two aspects of this conference need to be called to the attention of those who plan to attend. First, it is possible that a contract with Boeing could be signed between the date the conference is called and the date it is held. In order to be fair to the participating Companies, all individual pledges to attend must be honored, if timing prevents calling the Conference off. It is even possible that signing of a contract might have to be delayed until after the conference, if that Conference were to be considered a violation of the new contract. Second, the costs of the conference must be borne by the participants. A typical schedule of fees might be as follows: From the Engineer who accepts an offer, $15 or half of one month's raise, whichever is smaller. From the Company, a registration fee of $25 and $15 per Engineer hired.

Finally, it is planned that we will prepare and distribute to each Engineer who participates a list of suggestions for interviewing. It is hoped that these suggestions will be the distillation of the experiences of those among us who have changed jobs and have learned what they wished they had said or had asked. The type of item contemplated here is to ask questions about amount of and pay rate for overtime; be sure to get a written offer, etc.

[Return Addressed Envelope of Seattle Professional Engineering Employees Association, 308 New World Life Building, Seattle 4, Washington.]

Form 3547 Requested

Mr. Leonard P. Bonifaci
Route 1, Box 635
Mercer Island, Washington M3708

Pledges For Manpower Availability Conference
Sign or Check One Only

1. I pledge to attend this conference, I desire to change Companies, and I authorize the Executive Committee to notify Boeing of my intention not more than two weeks prior to the conference.

.....
Sign

.....
Print

2. I pledge to attend this conference and I desire to change Companies, but I desire not to disclose my intention to Boeing.

.....
Sign

.....
Print

3. I pledge to attend this conference, but do not necessarily desire to change Companies at this time. (Those signing this pledge may not be

called upon to attend if facilities and time do not permit.)

. . . . . .

Sign

. . . . . .

Print

For those who do not sign one of the first three pledges, please supply the following personal data:

4. I am willing that the conference be conducted, but I will not participate: Yes [ ] No [ ]

5. I desire that no conference be conducted: [ ]
For those who sign one of the first three pledges, please supply the following personal data:

6. Years engineering experience to nearest one-half year. (Do not include undergraduate time, but do include graduate time in college). . . . . .years.

7. College degrees awarded and major field. (For example, BS in AE). . .in. . ; . .in. . ; . .in. . .

8. One principal specialty. (Examples: stress analysis, functional testing, development testing, areodynamic analysis, structural design, preliminary design, etc. . . . . .

GENERAL COUNSEL'S EXHIBIT No. 3

Manpower Availability Conference

Organization of Subcommittees

Responsibility: The M.A.C. subcommittees are subcommittees of the Action Committee, and they report to that committee through its designated member, Bob Pearson.

Meetings and Performance: The chairman of each subcommittee will handle assignments within the subcommittee and will arrange such meetings as are necessary for the coordination and performance of the assigned duties.

Reports and Coordination: The subcommittee chairman will meet with the designated member of the Action Committee to report on subcommittee activities and to coordinate the work of the several M.A.C. subcommittees.

Duties: The duties of the various M.A.C. subcommittees are set forth below. Deviations from this outline may be made if experience indicates that such deviations would materially improve the efficiency of the operation.

M.A.C. Registration Subcommittee:

1. Count and tabulate the pledges.

2. Organize the pledge information for presentation to companies as enclosures with the invitation.

3. Prepare forms for the collection of: (a) raise offer data and (b) experience hired data during the conference.

4. Organize the raise offer data and the experi-

ence hired data for the record and for the participating individuals and companies.

M.A.C. Invitation Subcommittee:

1. Assemble the company names and addresses. (It is expected that a list of two to three thousand employers of engineers can be compiled. Certainly, all companies and agencies who are currently advertising for engineers should be included. It is suggested that each entry should be legibly made on a 3x5 card so the entries can be alphabetized and duplicates can be eliminated. Separate divisions of the same company are not necessarily to be considered as duplicates.)

2. Send out the letter of invitation. (The text of this and the other letters will be prepared by the Action Committee, and enclosures will be supplied by the M.A.C. Registration Subcommittee. The MAC Invitation Subcommittee will either actually mail the letters or employ a mailing service.)

3. Send out the letter announcing the date the Conference is to be held.

4. Send out the letter giving the details of operation of the Conference. (Preliminary information on operation of the Conference will have been included in the letter of invitation.)

5. Answer inquiries received in response to the letters (see 2, 3 and 4 above) as directed by the Action Committee.

6. Supply organized reports of all response to the invitation and of inquiries received in response to the letters.

M.A.C. Facilities Subcommittee:

1. Search for suitable halls to rent for the conference and arrange for rental after the required sizes have been estimated.

2. Provide suitable booths for exploratory contacts between the participating engineers and companies.

3. Provide furniture, equipment, telephones, signs, movies and slide projection equipment, etc.

M.A.C. Operations Subcommittee:

1. Draft rules for the conference.

2. Compile suggestions for the interviewers and print and distribute them.

3. Facilitate any printing ordered in advance of the conference by the participating companies.

4. Arrange and schedule private interviews between participating engineers and companies.

5. Distribute and collect "Offer data" cards.

6. Distribute and collect "Acceptance data" cards.

7. Make final arrangements for the conference, e.g., determine the date, arrange address to the participants, invite the press, etc.

8. Obtain Seattle city license for SPEEA's M.A.C. to operate as an employment agency; obtain the necessary surety bond; obtain or prepare contracts necessary for compliance with Seattle ordinance.

Membership: M.A.C. Registration Subcommittee: Bill Bowlby, Chairman, 7901, LO-0766; Bill Hamilton, 7901, WE-0919.

M.A.C. Invitation Subcommittee: Gordy Gud-

munstad, Chairman, 7775, LO-1461; Mat Faletti, 2810; Gordon Gump, 1350, WE-2141; Ray Hodgerney, 1350, FI-0313; Jim Check, 2880, None; John Anderson, 7680, WE-2141; Bob Mulhall, 7297, John Pratt, 7297, MO-4484; Bob Munich, (6) 553 or (6) 542, None; Bill Krause, 1928, LA-2168; Bruce Young, 1928, AD-1467.

M.A.C. Facilities Subcommittee: Ted Hackett, Chairman, 1435, AV-6577; John Rotter, (8) 250, MI-0075; Alan Eid, 1928.

M.A.C. Operations Subcommittee: Clayton Myron, Chairman, 1550, CH-7114; Harold Sanders, 2744, LO-1692; Eugene Corey, (6) 1473, RA-1845.

Action Committee Members: Bob Pearson, 7926, REnton 5-7130; Dan Hendricks, Alternate, 7926, AD-0978.

SPEEA, 3121 Arcade Building, Second and University, Seattle 1, Washington. Phone SEneca 4925. Vol. III Dittos 10-17-52

GENERAL COUNSEL'S EXHIBIT No. 4

[Letterhead of Seattle Professional Engineering Employees Association]

Are You in Need of Additional Engineers?

The Seattle Professional Engineering Employees Association, with a membership of 2300, invites your Company to participate in a Manpower Availability Conference to be held in Seattle about March 9th, 1953. The purpose of the Conference is to put employers of engineers in contact with those of our members who are available for new positions.

Over 500 engineers, scientists and industrial mathematicians are pledged to attend the Conference. Represented in this group are men of assorted lengths of experience and types of training as is portrayed by the attached graphs. A distinction between men who are actively seeking new connections and those whose interest is more dependent upon the advantages of other situations will be noted in the make-up of the graphs.

These engineers are looking for more than a change of scenery. They are employed engineers who feel they would be capable of greater accomplishment in positions where engineering talents are directed more specifically to engineering work and where credit for individual effort and recognition of engineering excellence are more general. They seek a working climate where their training and ability will be more fully utilized and in which compensation is in proportion to talent and productiveness.

In order to provide a better understanding of the type of conference which is contemplated, a general outline of its operation might be of interest. It is planned that the Conference will be conducted in two separate phases.

The first phase will provide the means of quickly and efficiently arranging interviews between the five hundred engineers and the participating companies. This will be accomplished by conducting exposition-like meetings on as many consecutive evenings as appears necessary. At this time, the engineers, perhaps accompanied by their wives, will

visit the various booths, which are to be provided for each of the participating companies.

The representatives of each company will here have the opportunity to address groups of engineers, to explain the company's needs and the advantages of employment with it, and to distribute descriptive literature and application blanks to those who are interested. Secretaries at a centrally located Association booth will then make appointments for private interviews.

Providing an opportunity for the participating companies to show a limited number of motion pictures is under consideration. The Association will provide ditto and mimeograph facilities for any duplicating the company representatives may require. An augmented Association secretarial staff will also be at their disposal.

The second phase of the Conference will consist of individual private interviews. These interviews may be conducted in the hotel rooms of the company representatives or, if it is desired, the Association will provide other suitable facilities.

Inasmuch as these engineers are seeking particular situations wherein their experience and capabilities are most fully utilized, it is recommended that the participating companies send engineering representatives who can accurately present detailed job requirements and describe the conditions of employment on the company's engineering staff. These representatives should come prepared to make firm offers when they interview engineers meeting their requirements.

It is planned that the Conference will be self-liquidating. For this reason, each company will be asked to pay a registration fee of $25 and an additional fee of $10 for each engineer hired as a direct result of the Conference. These fees may be rebated on a pro rata basis if the costs of the Conference are appreciably less than the fees collected. Each engineer who accepts a position as a result of the Conference will be charged a fee of $15.

To insure adequate preparation for the Manpower Availability Conference, commitments to attend will be accepted until February 6, 1953. Answers to the questions appended to this invitation will aid the Association in its planning for the Conference. Receipt of acceptances of this invitation will be acknowledged in a subsequent letter which will announce the date and supply additional details.

Yours very truly,

/s/ Chas. Robt. Pearson,
Director Manpower Availability Service (Licensed and Bonded Employment Agent)

How many engineers do you need?

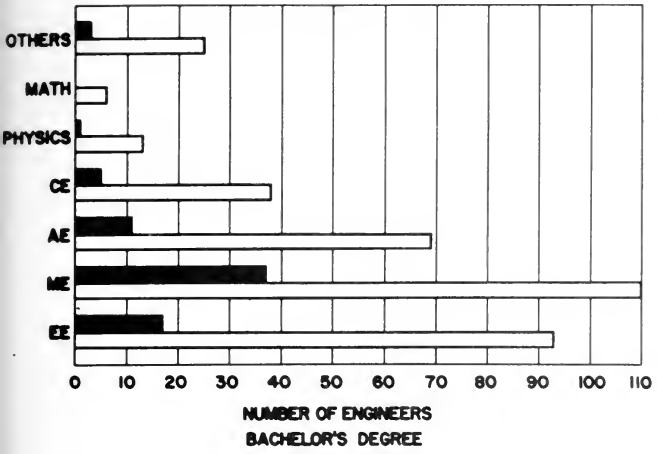
How many representatives will you send?

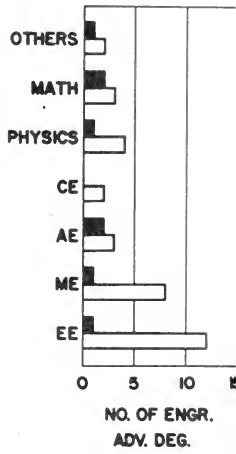
Would you like for the Association to make your hotel reservations? What accommodations are desired?

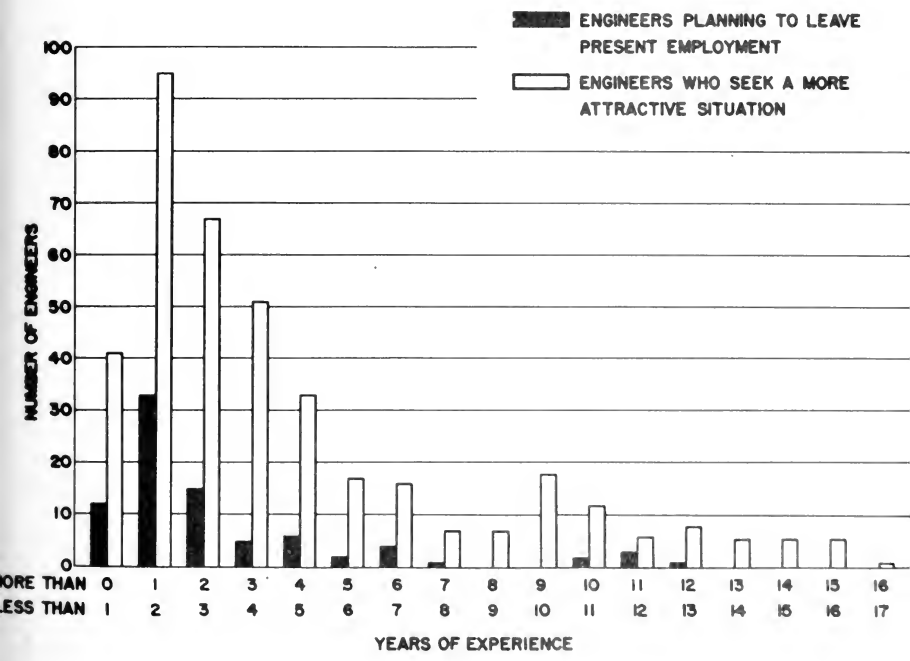
What special facilities would you wish the Association to supply? Please note that individual sound amplification systems will not be permitted.

EXHIBIT #4 CONT.

STATISTICAL DISTRIBUTION OF ENGINEERS
PLEDGED TO ATTEND MANPOWER AVAILABILITY CONFERENCE







GENERAL COUNSEL'S EXHIBIT No. 5

[Letterhead of Seattle Professional Engineering Employees Association]

Correct Address: 3121 Arcade Bldg., Seattle 1, Wn.

Mr. A. F. Logan, Vice President
Industrial Relations, Boeing Airplane Co.
Seattle 14, Wn.

Dear Sir:

1. This is to advise you that SPEEA has started and will complete a Manpower Availability Conference.

2. Various companies are to be invited to come to Seattle to interview those SPEEA members who have expressed a desire to entertain offers of employment.

3. This conference is being conducted for the following purposes:

(a) To provide members with improved opportunities to bargain for their services. Our membership has requested SPEEA to restore the freedom and privacy of engineers who seek to improve their situations by changing employers.

(b) To obtain data on the true market value of engineers with various amounts of experience.

4. In offering this service to its members, SPEEA has retained an agency for bringing together those engineers and companies who may care to discuss employment possibilities. SPEEA offers no special inducement to engineers to terminate,

nor does it enter in any way into negotiations between the companies and the engineers.

Very truly yours,

/s/ E. M. Gardiner, Chairman
Executive Committee

Rec'd 1/23/53.

GENERAL COUNSEL'S EXHIBIT No. 6

CAW: You were returned to Seattle because the management wishes to discuss your outside activities with you. I will inform them that you are in the plant. Until then I suggest you work on your trip report. 8:15 a.m.

CAW: Would you go into Woody McKissick office? 9:40 a.m.

Logan: I wish to discuss a letter I received from Mac Gardiner last week in which was enclosed this letter signed by you as a licensed and bonded employment agent.

Is this your signature?

CRP: Yes.

Logan: Are you a licensed and bonded employment agent?

CRP: Inasmuch as this question directly concerns my activities in behalf of the SPEEA, I insist that appropriate members of the SPEEA Exec. Comm. be present for further discussion of the question. These members are Mac Gardiner and Dan Hendricks.

Logan: Does this mean that you refuse to answer the question?

CRP: Since Mr. Soderquist is also present and I am not accompanied by the SPEEA representatives concern, and since I have not consulted legal counsel as yet, I cannot answer the question at this time.

Logan: Will you take a look at this facsimile signature and tell me if this is a facsimile of your signature?

CRP: I can only repeat that this discussion cannot continue further until Mr. Gardiner and Mr. Hendricks are present. This matter concerns only my legitimate union activities and cannot be continued on a personal basis.

Logan: * * * * *

This has nothing to do with SPEEA.

Are you a licensed and bonded employment agent?

We are not talking about the your SPEEA membership or activities.

If you are an employment agent and working at it, I have some suggestions for you.

CRP: Since the letter you have is on a SPEEA letterhead, and since any and all employment agency activities in which I might enter are in behalf of SPEEA, this is a SPEEA matter and must be handled as such rather than as a personal inquisition. Do you intend to call in the responsible SPEEA officials?

Logan: This is neither an inquisition or personal. This is an attempt to get some facts from you.

Logan: I wish you would listen to me.

I'll get my secretary to take it down and give a carbon copy to you.

CRP: I will listen. You have my attn.

Logan: Transcribed notes.

CRP: This discussion cannot be continued until the appropriate SPEEA representatives are present, and I refuse to acknowledge your comments as other than direct SPEEA business.

Logan: You have had your chance to make your choice * * *

CRP: Whereas the timing * * *

Logan: Is that your statement or have you something more to say?

CRP: Yes and no.

Logan: * * * Transcribe notes.

GENERAL COUNSEL'S EXHIBIT No. 7

January 27, 1953, 10:00 a.m.

Continuing discussion started without stenographic reporting:

L: I am talking to Charles Robert Pearson. I will, first, say, and I repeat for the third time, this has nothing to do with your membership in or activities on the behalf of SPEEA. I am interested rather in whether you are or are not a licensed and bonded employment agent. Furthermore, I am interested in whether you are or are not working as an employment agent at this time. I have given you an opportunity to discuss this informally, but you chose not to do so. So far you have insisted on

reducing everything, at least that you have said, to writing. So we now will reduce it all to writing. I will furnish you with a carbon copy of the stenographic transcription.

It is our belief that in the absence of any information from you and your refusal to give us any information with respect to your alleged activities as an employment agent we can make a reasonable assumption that the allegations are true. You have had reasonable opportunity to inform us otherwise if such were the case. We do not believe that you can do justice to such activities and your work as an employee of Boeing when carried on simultaneously. And, therefore, the suggestion which I had intended to make and now make is that you elect to give up one or the other of these activities. We do not propose that you shall proceed to carry both of them out. Now, would you like to make that choice?

P: (Writing)

L: You don't have to write it. You will get it all. You will get a copy of the transcribed notes.

P. (Continues writing)

P: This discussion cannot be continued until the appropriate SPEEA representatives are present and I refuse to acknowledge your comments as other than direct SPEEA business.

L: You have had your chance to make your choice, and it is obvious you have no intention to do that, so that places us in the position where we have to make our own decision as to which of these activities; namely, the operation of an employment

agency or your assigned work as a Boeing employee are going to be paramount in your mind. We will, therefore, make the decision that your work as an employee at Boeing would be entirely too greatly impaired by your outside activities as an employment agent, and we are therefore unwilling to permit you to continue such activities and remain in our employ. Our decision for the reasons stated is that you are being terminated forthwith.

P: (Reads from previously written notes taken from his pocket.)

P: Whereas the timing of this action is definitely connected with our release of the manpower availability conference invitations in behalf of the Seattle Professional Engineering Employees Association this action can only be interpreted as being a retaliatory action against the SPEEA and discrimination against me personally and retaliation against my legitimate union activities. I therefore demand that this action be dropped and that the appropriate executive committee liaison officer and chairman be present at any further discussion of it.

L: Is that your statement?

P: (Silence)

L: In other words, is it my turn to answer? That is what I am trying to find out. Or have you something more to say?

P: Yes and no.

L. (To secretary) Did you get that? Yes and no. I don't know what he means, but his answer is yes and no. I will answer it anyway.

L: You have a right to any views you care to

express, here or elsewhere. And I have a right to disagree with you, here or elsewhere. Hence, I do not accept the foregoing statement by you of the implications of this action on my part. And there will be no further discussion of this matter with you as an employee of Boeing. Now, I have nothing more to say, have you?

P: (Silence)

L: If you have, you have an opportunity to say it and get it in this record.

P: (Silence)

L: As far as I am concerned, the interview and the discussion is over. Now, Mr. Soderquist, will you see that the necessary steps are taken to implement Mr. Pearson's termination forthwith.

GENERAL COUNSEL'S EXHIBIT No. 8

Appendix B

Dept. 481; Clock 7188; Name Pearson Charles Robert; Social Security Number 252-12-2544. Emp: 7-31-50.

Boeing Airplane Company, Seattle 14, Wash.

Termination of Employment

Male [x]. Job number 07-12. Rate 247. Shift 1. Effective Date 1-27-53. Hours worked this date 8. Job title Engr. Designer A (B-52A Pneumatics). Permanent address 19725 Marine View Dr. S.W., Seattle 66, Wash.

Dismissal [x]

* * * * *

Remarks: Dismissal: Refusal to answer questions relative to outside activities as employment agent.

/s/ W. W. McKissick,
Foreman or Supervisor

Required in cases of dismissal only: Signed by A. A. Soderquist, Gen. Supt. or Division Head.

GENERAL COUNSEL'S EXHIBIT No. 9

[Letterhead of Boeing Airplane Company]

February 11, 1953

Mr. Charles Robert Pearson
Seattle, Washington

Dear Mr. Pearson:

Seattle Professional Engineering Employees Association has requested a more particularized statement of the Company's reason for terminating your employment on January 27, 1953.

> The entry on your termination slip is as follows: "Refusal to answer questions relative to outside activities as employment agent."

In our opinion this statement summarizes the position taken by you at the conference between you and the undersigned on January 27, 1953, at which you were informed of the reason for your termination. By reason of the conference which preceded it, this entry was considered as adequate but, in response to SPEEA's request, this letter will serve to review the matter.

On January 23rd we were notified in letter form by SPEEA that that organization had started and intended to complete what SPEEA has referred to for several months as the "Manpower Availability Conference," and that it had retained an agency to arrange the interviews. With this letter was a printed copy of an invitation to this conference bearing a facsimile of your signature and indicating that you were a licensed and bonded employment agent acting as "Director Manpower Availability Service."

It was clearly apparent from this letter and invitation that SPEEA had started and intended to carry out a nationwide solicitation of our business competitors, and others who compete with us in hiring engineers, in an effort to bring about a situation in which substantial numbers of engineers would leave the employ of this Company, for employment elsewhere.

It is obvious that even if there were an adequate supply of engineers at the present time, such a program would be against the best interests of Boeing Airplane Company. However, as you know, there is not an adequate supply of engineers at this time; the Company is in serious need of more engineers and has been conducting an extensive nation-wide advertising campaign designed to fill this need. Thus, the invitation signed by you is part of a deliberate program which is very damaging to the Company.

For the purpose of determining whether you had

authorized the use of what appeared to be your signature on the invitation and whether you were actually engaged in the program, we wired you on January 24, 1953, to arrange a conference on this subject.

You have your notes and the stenographic record of the conference on the 27th. After identifying the facsimile on the invitation as your signature, you in effect refused to answer further questions.

As your work in connection with the program is clearly against the best interests of the Company and in violation of your obligations as an employee, you were asked to elect either to give up your work as an employment agent or to leave the Company's employ. You refused to make such an election, leaving the Company no alternative but to terminate you.

It seems to us that while an employee continues at work, continues to draw salary from a company and is not on strike, it is no more than proper for that company to require that he do nothing intentionally which would have the effect of seriously damaging that company. On the other hand, it does not seem to us that an employer should be compelled to continue paying a salary to an employee who engages in a deliberate program resulting in serious damage to the Company, whether or not his activities have been authorized or ratified by a collective bargaining organization of which he is a member.

For these reasons, your dismissal is considered proper.

Yours very truly,

/s/ A. F. Logan, Vice President
Industrial Relations

GENERAL COUNSEL'S EXHIBIT No. 10

[Letterhead of Boeing Airplane Company]

Mr. E. M. Gardiner October 13, 1952
Chairman Executive Committee
Seattle Professional Engineering Employees Assn.
New World Life Building, Seattle 4, Washington

Dear Mr. Gardiner:

In compliance with the request made at the meeting October 2, there is submitted herein a statement explaining the basis for the development of the so-called "Gentlemen's Agreement" and how it is applied by Boeing. The following statements have been made verbally to the SPEEA Executive Committee in recent meetings.

The Aircraft Industries Association is made up of member companies engaged in the manufacture of aircraft engines, propellers, and equipment. This Association has mutually agreed on a resolution condemning the practices of pirating help from one another. The purposes of this resolution are to limit or prevent the establishment of hiring halls by each aircraft company in the area of each of the other companies for the purposes of pirating labor. In the

absence of this resolution, it has been demonstrated in the past that such hiring halls would result. The consequences of such operations would be of the nature of auctions or stock markets bidding for the services of aircraft employees. In the case of engineers and similar professional employees where the commodity desired is not something that can be weighed or measured, the character of such an auction would be questionable. The consequences would have a disruptive effect upon the whole aircraft development effort and would establish an atmosphere very unsettling to the engineer himself. The character of the engineer's job is not one which would be enhanced by frequent moves which would naturally result from such hiring hall activities.

The resolution mentioned above is often referred to as the "Gentlemen's Agreement" and many misunderstandings have grown up with respect to it. One of these is that the agreement works to restrict the freedom of the employee in seeking and finding employment elsewhere, and that it thus works to his disadvantage. It is believed that a full understanding of the method of the procedures used under this resolution would correct any such misapprehension. A typical operation of the resolution is illustrated as follows:

Employee Jones of Aircraft Company A, either due to dissatisfaction with his job, his rate of pay, the climate, or due to reasons of health, personal reasons, or otherwise, writes to Aircraft Company B expressing his interest in employment with that company. Company B replies, expressing its interest

but asking him permission to contact his employer before entering into negotiations toward an agreement. If the employee gives his consent, Company B writes to Company A telling it that it has been contacted by Employee Jones seeking employment with it. The permission of Company A is requested before negotiations are opened with the employee. Company A then contacts its employee to determine the cause for his dissatisfaction and discusses with him ways and means of satisfying him to remain in its employment. If the employee still wishes to move and for personal reasons or otherwise is not dissuaded in his desire, then Company A gives permission to Company B to negotiate.

Now, during the discussion between the employer and the employee there is every advantage accruing to the employee at this point. In some cases the employer may offer a higher wage, a reassignment, or some other correction of an unsatisfactory condition which he may not have known existed. If these circumstances can be corrected and the employee satisfied to remain in his present job, then the employee's situation has been improved and the added cost and disruption to his family life avoided. On the other hand, if the employee still wishes to move, Company A conveys its permission to Company B to negotiate.

While it is unusual for applicants to refuse permission to contact present employers, occasionally permission is refused. In such cases our company is reluctant to show any further interest because we are prevented from determining the man's ability

in the opinion of his employer. There have been cases wherein unadvised employees of some aircraft companies have misunderstood and misstated the purpose of those companies in respect to this employment policy. Such cases should not be construed as being examples of its operation.

It is well to note here that the resolution is only that. Any representation that a contract exists is in error. The Aircraft Industries Association is not organized in a manner that contracts between its members for association purposes are possible.

The aircraft companies at large, and this one in particular, are fully aware that an employee who has been frustrated in an attempt to move is an unhappy and dissatisfied employee, and therefore no effort is made to dissuade a determined purpose to move. Thus, arbitrary refusals on the part of companies in reply to requests for permission to negotiate with one of their employees are very rare indeed.

It is believed that the best interest of all parties is served when negotiations of this character are considered openly and aboveboard.

Yours very truly,

/s/ A. F. Logan, Vice President
Industrial Relations

GENERAL COUNSEL'S EXHIBIT No. 11

[Letterhead of Chance Vought Aircraft]

Engineering Personnel PS-5-2521 June 26, 1952

Mr. Charles-Robert Pearson
427 Grandey Way, Renton, Washington

Dear Mr. Pearson:

With reference to your letter of June 13 we regret to inform you that under our company policy, as stated in our original letter of June 5, we will not negotiate with you until we have had your permission to contact your present employer.

Very truly yours,

United Aircraft Corporation Chance
Vought Aircraft Division
/s/ G. H. Orgelman, Supervisor,
Engineering Personnel

GHO:js

GENERAL COUNSEL'S EXHIBIT No. 12

[Letterhead of Chance Vought Aircraft]

Engineering Personnel PS-5-2504 June 17, 1952

Mr. Charles-Robert Pearson
427 Grandey Way, Renton, Washington

Dear Mr. Pearson:

We are in receipt of your letter of June 13 in which you submitted a resume of your experience to be considered as an application for possible employment. We are interested in your background, but in order that we may give full consideration to your application, please complete the enclosed form

and return it to us as soon as possible.

Due to the fact that you are presently employed by a member of the aircraft industry, we will be unable to negotiate with you until we have received your permission to contact your present employer. Please advise us of your decision with regard to this matter.

We shall look forward to your early reply.

Very truly yours,

United Aircraft Corporation, Chance Vought Aircraft Division
/s/ G. H. Orgelman, JLI Supervisor, Engineering Personnel

JLI:js

GENERAL COUNSEL'S EXHIBIT No. 13

[Letterhead of Lockheed Aircraft Corporation]

Mr. Charles R. Pearson June 25, 1952
427 Grandey Way, Renton, Washington

Dear Mr. Pearson:

We have reviewed your application of June 17, 1952, with interest.

It is the policy of Lockheed Aircraft Corporation to adhere strictly to the agreement of Aircraft Industries Association which prohibits us from offering employment to persons employed by member companies. Since you are presently employed by Boeing Airplane Company, a member of this association, our policy prohibits us from discussing a position at this time.

However, we appreciate the interest you have expressed in our Georgia Division.

Yours very truly,

/s/ J. M. Wade, Jr.,
Employment Manager

JMW/JH/vmh

GENERAL COUNSEL'S EXHIBIT No. 14

[Letterhead of North American Aviation, Inc.]

Mr. Joseph P. Ivaska January 20, 1953
18135 Brittany Drive, Seattle 66, Washington

Dear Mr. Ivaska:

It may confuse you to have correspondence with so many representatives of North American.

On a recent recruiting trip on the MIT campus Mrs. Evelyn Yates of the Alumni Placement Bureau recommended you as having excellent potential for employment in our organization. On my return to Downey it was evident that correspondence was under way and also that you had not seen fit to complete our formal application for employment. You are probably concerned lest this AIA affiliation imposes insurmountable restrictions. Actually, our affiliation with AIA has no bearing on our employment opportunities except that in accordance with company policy we do not proselyte engineers from organizations engaged in vital defense work. If you are interested in employment with us the chain of events will be as follows:

Your application will be studied by the interested

group, or groups, and if they desire that an offer be made we will merely ask your permission to contact Boeing to determine if they consider our work as important or possibly more important than that being performed by them. If they have determined in conference with you that you desire to leave the Seattle area they may approve our negotiating with you, in which case we will make our formal offer. If they feel that your loss would be too great and that you will stay with them if no other company interferes we will gracefully withdraw.

Mr. J. P. Morris of our Propulsion Development Section is particularly interested in controls as related to our rocket engine. Your work in servos, etc., is directly applicable to the work he is doing and you would undoubtedly be very interested in his field.

Another application is enclosed for your convenience in the event that you should feel it desirable to make application with us. At any rate, we would certainly appreciate being advised of your decision.

Very truly yours,

North American Aviation, Inc.,
/s/ W. T. Rinehart, Engineering Personnel
Missile and Control, Equipment
Departments

WTR:asi—encl.

GENERAL COUNSEL'S EXHIBIT No. 15

[Letterhead of North American Aviation, Inc.]

Mr. Joseph P. Ivaska 8 January 1953
18135 Brittany Drive, Seattle 66, Washington

Dear Mr. Ivaska:

Thank you for your letter of December 30, 1952, to the attention of Mr. H. W. Schroeder of this office.

Your professional qualifications are of interest to us, and if it is your intention to relocate in Southern California, we would appreciate your completing the enclosed application forms and returning them to us. Should a suitable opening be available since you are now in an essential industry, we would like to have your permission to contact your present employer before negotiating further with you.

Thank you for your interest in our organization.

Very truly yours,

North American Aviation, Inc.
/s/ L. G. Baldwin, Engineering Personnel
Missile & Control Equipment Depts.

LGB:jb—Encls.

GENERAL COUNSEL'S EXHIBIT No. 16

[Letterhead of Seattle Professional Engineering Employees Association]

February 13, 1953

Mr. A. F. Logan, Vice President, Industrial Relations, Boeing Airplane Company
Seattle 14, Washington

Dear Mr. Logan:

This communication outlines our proposal for increases in the basic salary structure and base salary rates of Boeing employees under the jurisdiction of the Seattle Professional Engineering Employees Association and for a revised formula for computing supplemental compensation for scheduled overtime work for such employees in the "exempt" classification.

We propose that:

(a) the base salary rate of each said employee be [per biweek E.M.G.] increased by 9.7% to the nearest one dollar, Δ and that all minimum and maximum rates for the various SPEEA classifications be increased by 9.7% to [per biweek E.M.G.] the nearest one dollar, Δ and

(b) the method of computing the hourly rate for scheduled overtime work of employees in the "exempt" classifications be revised from the present "$3.00 per hour, or straight time, whichever is greater" to time and one-half on all base rates up to and including $200.00 bi-weekly, and to straight

time plus $1.25 per hour on all base rates above $200.00 bi-weekly, and

(c) all of the above provisions are to be made effective as of the date July 1, 1952, and are to apply to all time and scheduled overtime worked by employees in SPEEA classifications whether or not such employees are still in the employ of the Boeing Airplane Company, and

(d) this proposed agreement shall have as its next anniversary date July 1, 1953, and

(e) this proposed agreement shall contain a sick leave clause substantially incorporating the pertinent portions of the existing Boeing Management Procedure No. 552 on the subject: "Sick Leave", and

(f) all other provisions of this proposed agreement shall be substantially those of the agreement in effect at the opening of the current negotiations.

It is the intention of the Executive Committee to recommend rejection of any offer made by the Boeing Airplane Company until such time as Mr. Charles Robert Pearson is reinstated unequivocally. Such reinstatement shall not be in any way contingent upon his relinquishing his prerogative of managing the SPEEA Manpower Availability Conference.

Your very truly,

/s/ E. M. Gardiner, Chairman
Executive Committee

GENERAL COUNSEL'S EXHIBIT No. 17

[Letterhead of Boeing Airplane Company]

Seattle Professional Engineering Employees Association
New World Life Building, Seattle, Washington

March 2, 1953

Gentlemen:

In your letter of February 13, you offered a revised contract proposal, but indicated in the last paragraph that further bargaining on the matter of a new contract between the Company and you would be fruitless unless Mr. Charles R. Pearson, recently terminated by the Company, were first reinstated.

We are by this letter offering reemployment to Mr. Pearson to his former position as of the time he is available and returns to work, and in doing so, we wish to make our position clear to you.

First, although we consider the Pearson matter to be entirely beyond the scope of the contract bargaining negotiations between the parties, we do not want to see any controversy of this nature impair negotiations that directly affect such a large number of engineers.

Second, you have been very candid in stating to us the results of the Manpower Availability Conference, which as we understand it, did not attain the objectives for which it was intended. Mr. Pearson's termination has been reviewed in light of this fact and the fact that, to our knowledge, further activities in connection with this Conference are not anticipated. The offer to reemploy him is not to be interpreted as reflecting any different position

on the part of the Company as to activities of this type conducted by those who are not on strike but continue to draw salary. We cannot consider it proper to believe that such an employee has the right to conduct such activities to the detriment of the Company.

We are making reply, by separate letter, to that portion of your letter of February 13, which contains your revised contract proposal.

Yours very truly,

/s/ Jas. D. Esary, Jr.,
Labor Relations Manager

GENERAL COUNSEL'S EXHIBIT No. 18

[SPEEA Letterhead]

Mr. A. F. Logan, Vice-President March 31, 1953
Industrial Relations Division
Boeing Airplane Company, Seattle 14, Washington

Dear Sir:

In a meeting held on March 5, 1953 between representatives of the Boeing Airplane Company and SPEEA, a verbal agreement was reached by both parties concerned whereby the rehiring of Chas. Robt. Pearson was effected. The proposal contained the agreement to rehire Mr. Pearson without prejudice and with all rights and privileges restored which the employee had acquired prior to his termination. It is the desire of the present Executive Committee to have enumerated in writing what

these rights and privileges are. It is our belief that they may be enumerated as follows:

1. Sick-leave accumulated prior to termination.

2. Seniority dating back to the original date of employment with BAC.

3. Eligibility for the 6% increase and retroactive pay back to July 1, 1952.

4. Should Chas.-Robt. Pearson wish to leave BAC his referral from the company would be based on his demonstrated performance and engineering abilities, without reference to his activities with the MAC.

Your written concurrence on the above items would be appreciated.

SPEEA's acceptance of the above agreement is not to be interpreted as reflecting any different position in regard to the legality and ethics of this type of activity. We do consider it proper and ethical and legal to carry on such activities on behalf of service and information to our membership.

Very truly yours,

/s/ F. D. Frajola, Chairman
SPEEA Executive Committee

GENERAL COUNSEL'S EXHIBIT No. 19

[Letterhead of Boeing Airplane Company]

Mr. F. D. Frajola, Chairman April 7, 1953
SPEEA Executive Committee, Seattle Professional Engineering Employees Association
3121 Arcade Building, Seattle 1, Washington

Dear Mr. Frajola:

This is in reply to your letter of March 31, 1953, in which you state in part:

"In a meeting held on March 5, 1953 between representatives of the Boeing Airplane Company and SPEEA, a verbal agreement was reached by both parties concerned whereby the rehiring of Chas. Robt. Pearson was effected. The proposal contained the agreement to rehire Mr. Pearson without prejudice and with all rights and privileges restored which the employee had acquired prior to his termination * * *"

Apparently you are misinformed completely as to what took place in the meeting referred to above. At that meeting in response to questions asked by the SPEEA representatives present, I commented that the Company, in its letter to SPEEA dated March 2, 1953, had stated why and upon what basis it would reemploy Mr. Pearson. For your convenience the pertinent paragraphs of that letter are quoted:

"We are by this letter offering reemployment to Mr. Pearson to his former position as of the time he is available and returns to work, and in doing so, we wish to make our position clear to you.

"First, although we consider the Pearson matter to be entirely beyond the scope of the contract bargaining negotiations between the parties, we do not want to see any controversy of this nature impair negotiations that directly affect such a large number of engineers.

"Second, you have been very candid in stating to us the results of the Manpower Availability Conference, which as we understand it, did not attain the objectives for which it was intended. Mr. Pearson's termination has been reviewed in light of this fact and the fact that, to our knowledge, further activities in connection with this Conference are not anticipated. The offer to reemploy him is not to be interpreted as reflecting any different position on the part of the Company as to activities of this type conducted by those who are not on strike but continue to draw salary. We cannot consider it proper to believe that such an employee has the right to conduct such activities to the detriment of the Company."

You will note that sick leave, seniority, and the 6% adjustment were not mentioned in this letter nor were they discussed at the meeting on March 5.

However, the question as to the type of referral the Company would give Mr. Pearson was raised by the SPEEA representatives. They were informed that the Company would reply to inquiries regarding Mr. Pearson as follows:

> "Technical service satisfactory. Terminated because outside activities interfered with employment."

and that if Mr. Pearson returned to the payroll, such inquiries, after that date, would be handled on the basis of his performance after such return.

On March 17, Mr. Pearson was reemployed pursuant to the offer set forth in our letter of March 2, quoted above. On its own initiative, the Company restored his company service, sick leave accumulated before termination, his extended vacation eligibility, and applied the 6% increase for time worked retroactively to July 1, 1952.

Yours very truly,

/s/ Jas. D. Esary, Jr.,
Labor Relations Manager

RESPONDENT'S EXHIBIT No. 1

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. William H. Allen, President April 2, 1952
Boeing Airplane Company, Seattle 4, Washington

Subject: Agreement between Boeing Airplane Company and Seattle Professional Engineering Employees Assn., dated August 31, 1952.

Dear Sir:

In compliance with Article X of the subject agreement we hereby notify the Company that we desire to amend the agreement by negotiating certain changes which we feel are necessary to improve the morale of the Engineering Division and to establish the engineer in his proper place in

relation to the rest of society with regard to his salary and working conditions.

The following items are those which we desire to discuss:

1. General Raise
2. Overtime

It is recognized that other subjects may be brought up during the course of negotiations. It is desired that meetings be scheduled twice weekly and that in no case should the period between meetings exceed one week.

In accordance with the revised reopening date agreed to during the 1951 negotiations, it is suggested that the first meeting date be April 7, 1952.

Very truly yours,

Seattle Professional Engineering
Employees Association
/s/ E. M. Gardiner, Chairman
Executive Committee

EMG:vm

RESPONDENT'S EXHIBIT No. 2

[Letterhead of Boeing Airplane Company]

In reply refer to 405

Mr. E. M. Gardiner April 3, 1952
Chairman, Executive Committee, Seattle Professional Engineering Employees Association
New World Life Bldg., Second and Cherry,
Seattle, Washington

Dear Sir:

Your letter of April 2, 1952 addressed to Mr.

William M. Allen expressing your desire to open the contract for negotiation of certain changes has been referred to the writer for appropriate reply.

The Company representatives will be available to meet with your committee in the Engineering conference room No. 403 at 10:00 a.m. on Monday, April 7, 1952.

Yours very truly,

/s/ A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 3

[Letterhead of Boeing Airplane Company]

In reply refer to 403
Mr. E. M. Gardiner June 27, 1952
Chairman, Executive Committee, Seattle Professional Engineering Employees' Association
New World Life Building, Seattle 4, Washington

Dear Mr. Gardiner:

This communication outlines our offer to increase the basic salary structure and base salary rates of employees covered under our agreement with your organization, and to revise the formula for computing supplemental compensation for scheduled overtime work for such employees in the "Exempt" classifications. This offer is subject to prior approval by the United States Air Force and the Wage Stabilization Board.

Briefly, we propose:

(a) to increase the base salary rate (as of July

1, 1952, under the current Agreement) of each employee covered by that Agreement by six per cent to the nearest one dollar and to increase all minimum and maximum rates appearing in Appendix "A" to the current Agreement by six per cent to the nearest one dollar; and

(b) to revise the method of computing the hourly rate for scheduled overtime work of employees in the "Exempt" classifications from the present "$3.00 an hour, or straight time, whichever rate is greater" to time and one-half on all base rates up to and including $200 bi-weekly, and to straight time plus $1.25 an hour on all base rates above $200 bi-weekly.

In view of the fact that there has been a delay on our part in presenting this offer, we propose to make the effective date July 1, 1952, if the offer is accepted by you within the next sixty days.

Yours very truly,

/s/ A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 4

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. A. F. Logan July 10, 1952
Vice President of Industrial Relations
Boeing Airplane Company, Seattle, Washington

Reference: Your letter, BAC 403

Dear Mr. Logan:

In reply to your offer of June 27, SPEEA rejects this offer.

Very truly yours,

/s/ E. M. Gardiner, Chairman
SPEEA Executive Committee

RESPONDENT'S EXHIBIT No. 5

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. A. F. Logan August 25, 1952
Vice President of Industrial Relations
Boeing Airplane Company, Seattle 14, Wn.

Subject: Second Contract Agreement Proposal.
Reference: Percentage Raise Proposal Analysis of May 7th, 1952. Your letter No. 403.

Dear Mr. Logan:

The following is a revised proposal containing those provisions which the Executive Committee considers as equitable and practical in view of the discussions which have been continuing with Company representatives since April 7th, 1952.

Major Provisions

1. Base Pay Raise: 13.5% to all those in the SPEEA classifications. This percentage to be retroactive to July 1, 1952.

2. Overtime: Those provisions offered in your letter of June 27th (No. 403). "Time and one-half on all base rates up to and including $200 bi-weekly and to straight time plus $1.25 an hour on all base rates above $200 bi-weekly."

3. Merit Raises: The average of merit raises granted to exempt and non-exempt classifications shall be raised to 7% for each classification.

4. Incentive Pay: 20% of that incentive compensation allocation authorized by Company Statutes shall be distributed to SPEEA personnel.

5. Pensions: Evidence of good faith in progress toward a pension plan can be shown by progress summaries each two months. If no pension plan is submitted by next March, 2½% shall be added to item 1 retroactive to July 1st, 1952.

6. Engineering Efficiency System: A system satisfactory to SPEEA and Boeing operating procedures which will provide for the transmittal of constructive suggestions to Boeing on matters of improved engineering utilization. This system will also allow a check as to the efficacy of the suggestions considered and adopted.

7. Time Clocks: To be discontinued for all SPEEA classifications.

8. Salary Data: (a) Annual review of "Anonymous Personnel Record" supplied each January 15th as of January 4th, starting with January 15th,

1952. (b) New entries to above in full to be supplied each January 15th as of January 4th, starting with January 15th, 1952. (c) Average merit raises in each classification each January 15th and July 15th. (d) Average reclassification raise into each classification supplied each January 15th and July 15th.

9. Sick Leave: To be included in the contract as written in the "Management Procedures" as of this date.

10. Area Representative System: In the major organizational units of the Company (Engineering and Manufacturing) and equitably distributed among the departments, the Association shall designate one employee as Representative for every ten (10) employees or major fraction thereof, and one of every five (5) such Representatives or fraction thereof as a Senior Representative. If the number of employees in any major organizational unit of the Company calls for only four (4) or less Representatives, the Association may designate any one of these as Senior Representative.

All Representatives and Senior Representatives shall be employees of the Company.

The number and location of Representatives and Senior Representatives may be adjusted by mutual agreement betweeen the Company and the Association. In the event a Representative or Senior Representative is to be transferred, the Company will, in so far as is practicable, notify the Association four (4) days in advance of the effective date of such transfer, and if the Association desires, the

Company will discuss such transfer with the Association. If such transfer is made at the Company's request, the Association will designate an additional Representative to assume the post of the transferred Representative if he cannot be placed by the Association as a Representative in his new assignment. Such transferred Representative or Senior Representative will complete his year of office with its attendant privileges.

Representatives and Senior Representatives may use a reasonable amount of time during working hours in the performance of their duties required in the administration of this Agreement, but shall inform supervision if it is necessary for them to leave their work area.

Very truly yours,

/s/ E. M. Gardiner, Chairman
Executive Committee

EMG:vm

RESPONDENT'S EXHIBIT No. 6

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. James Esary, Jr. July 21st, 1952
Boeing Airplane Company, Seattle 14, Washington

Dear Sir:

You are hereby notified that on and after thirty-one days from date hereof the Agreement (as amended) between Boeing Airplane Company and Seattle Professional Engineering Employees Asso-

ciation dated August 31, 1951 shall be automatically terminated.

SPEEA meanwhile stands ready to continue negotiations for a new contract.

Very truly yours,

/s/ E. M. Gardiner, Chairman
EMG:vm SPEEA Executive Committee

RESPONDENT'S EXHIBIT No. 7

[Letterhead of Boeing Airplane Company]

In reply refer to 405
Mr. E. M. Gardiner July 24, 1952
Chairman, SPEEA Executive Committee
New World Life Bldg., Second & Cherry
Seattle 4, Wash.

Dear Sir:

Your letter of July 21, 1952 giving notice that on and after thirty-one days from the date thereof the agreement (as amended) between Boeing Airplane Company and Seattle Professional Engineering Employees Association dated August 31, 1951 shall be automatically terminated is acknowledged.

The Company stands ready to continue negotiations for a new contract and meet at all reasonable times with your organization for that purpose.

Yours very truly,

/s/ Jas. D. Esary, Jr.
JDE:CS Labor Relations Manager

RESPONDENT'S EXHIBIT No. 8

[Letterhead of Boeing Airplane Company]

Mr. E. M. Gardiner September 3, 1952
Chairman, Executive Committee Seattle Professional Engineering Employees' Association
New World Life Bldg., Seattle 4, Washington

Dear Mr. Gardiner:

As the result of careful consideration of the written proposals you submitted under date of August 26, 1952, and the arguments presented by you in negotiation, we wish to extend our written offer as submitted under date of June 27, 1952, as follows:

> We are willing to write into an Agreement with S.P.E.E.A. a sick leave clause substantially incorporating the pertinent portions of our existing Management Procedure No. 552 on the subject: "Sick Leave," copy of which is attached.

In all other particulars, a review of the whole situation as it is apparent to us, including recent developments in negotiation, has not led us further to modify our previous offer.

/s/ A. F. Logan, Vice President
Industrial Relations

Attachment

RESPONDENT'S EXHIBIT No. 9

November 20, 1952

Seattle Professional Engineering Employees'
Association, New World Life Building
Second and Cherry, Seattle 4, Washington

Gentlemen:

Contract negotiations now have extended over a period of approximately seven months, including meetings in August and September with the Federal Mediation and Conciliation Service. It is believed that these negotiations have afforded both parties ample opportunity to explore and bargain with respect to the various respective demands and proposals and to study the information and data submitted by both parties in these negotiations. Under these circumstances and with this background it appears advisable that the Company state its ultimate position with respect to the various issues under negotiation, and such position is as follows:

The Company proposes the execution of a new contract between the parties; to become effective upon the date of acceptance of this proposal, if accepted; to cover a one-year period from such date; and to embody terms and provisions similar to those in the previous contract between the parties, with the following four numbered exceptions:

1. Bi-weekly base salary rates and rate ranges to be converted to weekly salary rates and rate ranges by dividing the former by two; the resulting

weekly rates and ranges then to be increased, effective July 1, 1952, by six percent (to the next higher cent where fractional cents result); subject to approval of the Wage Stabilization Board and Air Force. Pay dates to occur every two weeks, as in the past.

2. The method of computation of the hourly rate for scheduled overtime work of employees in the "Exempt" classifications to be revised, effective January 2, 1953, from the present "$3.00 an hour, or straight time, whichever rate is the greater" to time and one-half on all base rates up to and including $100 weekly, and to straight time plus $1.25 an hour on all base rates above $100 weekly.

3. We concur with your proposal to write into the contract a sick leave clause substantially incorporating the pertinent portions of an existing Management Procedure No. 552 on the subject: "Sick Leave," copy of which is attached.

4. With respect to your proposals regarding improving efficiency in the utilization of engineers as well as the punching of time clocks, we propose the introduction of a new classification in the "Exempt" category to be entitled "Associate Engineer" and to be assigned to Salary Grade 4, which currently embraces the titles "Aerodynamicist 'B,'" "Stress Analyst 'B,'" and "Field Service Representative 'B.'" The basic intent with respect to the utilization of the new classification is to enable management to accord a promotional channel for design and project engineers similar to that currently available for specialists in aerodynamics and stress, with the

result that those engineers assigned to the Junior Engineer "A" classification who have shown sufficient progress by demonstrating their ability in creative engineering work, apart from those specialized staff fields, may have the same avenue opened within the salary structure. This would in fact entail an earlier advance to the exempt category which does not require clock punching. The Junior Engineer "A" classification would continue to be utilized to provide a range for up-grading employees with increased experience and ability who are potential material for the Associate Engineer classification but have not yet demonstrated their professional ability by their performance under the circumstances present. Employees in the "Non-exempt" category who are not considered to have professional potential will be transferred to the appropriate draftsman classification to continue as non-professional employees. The titles "Aerodynamicist 'B'" and "Stress Analyst 'B'" would be absorbed into the new classification "Associate Engineer" and would be discontinued under this program, the title "Field Service Representative 'B'" remaining as it is.

The foregoing proposal for a new contract shall remain effective for your consideration for a period of thirty days from the date of this letter.

As to proposals you have made with respect to other subjects of negotiation:

(a) Line Management has recently been authorized to use up to three percent for merit increases for January 2, 1953, and July 3, 1953, in accordance

with the amount allowable under applicable Wage Stabilization regulations and at the discretion of Line Management.

(b) The Company is not willing to accede to SPEEA's proposal on incentive compensation. The Company will give immediate consideration to the modification of eligibility requirements of "Exempt" engineers in connection with the present suggestion system. In addition, the Company will continue to receive and give serious consideration to any suggestions your organization may care to make regarding engineering efficiency and utilization.

(c) If a pension plan, considered to be suitable and applicable to your group is developed, such plan will be submitted to you. Due to the complexities of the problems involved, the Company is unwilling to make further commitment on this subject at this time.

(d) We are willing to supply salary data as follows:

A new and complete "Anonymous Personnel Record" as of January 2, 1953, to be delivered as soon after that date as, with reasonable effort, it can be prepared.

Average merit raise data by classification as of January 2, 1953, and July 3, 1953, to be delivered promptly after those dates.

Average reclassification raise data by classification for the six month periods ending January 2, 1953, and July 3, 1953, to be delivered promptly after those dates.

(e) The Company is not willing to accept your

proposal as to area representatives and the use of working time in this connection.

The foregoing statements summarize the Company's position on all remaining issues that have developed in negotiations. It is the Company's sincere hope that a contract may be finalized on the basis of its proposal, at the earliest possible time.

Very truly yours,

/s/ A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 10

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. A. F. Logan December 20th, 1952
Vice President Industrial Relations
Boeing Airplane Co., Seattle 14, Wn.

Dear Mr. Logan:

This letter confirms a conversation with Mr. J. Esary of your staff during which I stated that your offer of November 20, 1952 was rejected by our membership by a vote of 1202 to 497. It is our expectations that negotiations with the Boeing Airplane Company will continue.

Very truly yours,

/s/ E. M. Gardiner, Chairman
Executive Committee

EMG:vm

RESPONDENT'S EXHIBIT No. 11

[Letterhead of Boeing Airplane Company]

December 26, 1952

Seattle Professional Engineering Employees' Association, New World Life Building
Second and Cherry, Seattle 4, Washington

Gentlemen:

This will acknowledge your letter of December 20, 1952, in which you confirm the rejection, by members of your organization, of the Company's offer of November 20, 1952 for a new contract.

You state that it is your expectation that negotiations with the Company will continue, and you may be assured that the Company also intends the continuance of such negotiations to the end that a new contract may be consummated between the parties, and will extend the fullest cooperation in arranging mutually convenient meetings for this purpose.

In the meantime, the Company feels that there are compelling reasons why certain items of its offer of November 20, 1952 should be placed in effect as soon as possible. These items are:

1. Bi-weekly base salary rates and rates ranges to be converted to weekly salary rates and rate ranges by dividing the former by two; the resulting weekly rates and ranges then to be increased, effective July 1, 1952, by six percent (to the next higher cent where fractional cents result); subject to approval of the Wage Stabilization Board and Air Force. Pay dates to occur every two weeks, as in the past.

2. The method of computation of the hourly rate for scheduled overtime work of employees in the "Exempt" classifications to be revised, effective January 2, 1953, and subject to Wage Stabilization Board and Air Force approval, from the present "$3.00 an hour, or straight time, whichever rate is the greater" to time and one-half on all base rates up to and including $100 weekly, and to straight time plus $1.25 an hour on all base rates above $100 weekly.

(Explanatory note: In connection with subparagraph 1, above, overtime payments would be computed retroactively, as if the 6% increase in base salary rates had been placed in effect on July 1, 1952. Further, overtime payments to "Exempt" employees for the period from January 2, 1953 and thereafter would be computed, in accordance with the formula designated in subparagraph 2, above, on the basis of the straight time rate as increased by the 6% general increase designated in subparagraph 1, above. The action designated in subparagraphs 1 and 2 and the treatment of overtime in accordance with this explanatory note would apply to those in the bargaining unit who are in the employ of the Company at the time such action is placed in effect and also to those in the unit who return to the employ of the Company on or before July 15, 1953. The policy indicated in this explanatory note as to overtime, as well as the action contemplated by subparagraphs 1 and 2 would, of course, be subject to Wage Stabilization Board and Air Force approval.)

It is recognized that the action designated in subparagraphs 1 and 2, above, is less than you have demanded, and it is assumed that your demands, to the extent that they are not met by such action, will be among the subjects of further negotiation. The proposed action would be completely without prejudice to such further negotiations or to your position in respect of such negotiations.

However, it is felt by the Company that such action should be taken as to the employees represented by your organization as soon as the necessary governmental approvals can be obtained, for the reasons that bargaining in respect of a new contract has extended over a period of many months, without agreement having been reached; that it appears that there is no immediate possibility of reaching any mutual agreement short of granting all or substantially all of your demands—which the Company is unwilling to do; that such action is desirable and equitable in view of the effective or contemplated increases to other Company employees; and that the Company's competitive hiring position compels such action.

We would like to discuss the matter with you and suggest a meeting with your Executive Committee for this purpose at 2:00 o'clock on Monday afternoon, December 29, 1952. Please advise if the time designated for such meeting is agreeable.

Yours very truly,

/s/ A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 12

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. A. F. Logan
Industrial Relations Division
Boeing Airplane Company, Seattle 14, Washington

January 5th, 1953

Dear Mr. Logan:

This will acknowledge your letter of December 26th, 1952, concerning your statement of intention to unilaterally apply for Wage Stabilization Board and Air Force approval for changes in the base rate and overtime rate of the SPEEA classification group.

It is the intention of the SPEEA organization to file an objection to this action with the Wage Stabilization Board and an unfair labor practice charge with the National Labor Relations Board.

You may be assured that any other actions considered by us in the future to be necessary will be discussed in future meetings with your staff.

Yours very truly,

/s/ E. M. Gardiner, Chairman
SPEEA Executive Committee

EMG:vm

RESPONDENT'S EXHIBIT No. 13

[Letterhead of Boeing Airplane Company]

In reply refer to 403 January 7, 1953

Seattle Professional Engineering Employees Association
3121 Arcade Building, Seattle 1, Washington

Gentlemen:

Your letter of January 5, 1953, is acknowledged. This letter refers to the proposed action by the Company to unilaterally apply for Wage Stabilization Board and Air Force approval for changes in the base rate and overtime rate of the SPEEA classification group, and then states:

> "It is the intention of the SPEEA organization to file an objection to this action with the Wage Stabilization Board and an unfair labor practice charge with the National Labor Relations Board."

Certainly no disparagement of your organization or of the negotiations being conducted by your organization is either intended, or would result from such increases inasmuch as the proposed action is less than you have demanded and it is a fact well known to your members that you have not withdrawn your overall demands but are continuing to press them. Further, as we have stated several times previously, the proposed action is completely without prejudice to your demands and further bargaining in respect of them, and the Company is

eady to meet with you at any time for such pur-
ose.

The proposed increases are not conditioned in
ny way upon withdrawal of your demands. Thus,
t would seem that the proposed action should be
egarded as mutually advantageous to your orga-
ization, to the employees it represents, and to the
Company; would be consistent with and in no way
rejudicial to good-faith bargaining; and on the
ontrary would amount to a constructive step in
he bargaining process.

Under these circumstances, we would appreciate
a statement from you as to why our proposed ap-
lication to the Wage Stabilization Board and to
he Air Force for approval of the proposed in-
reases is considered to be objectionable and as to
why such action is apparently considered by you to
onstitute an unfair labor practice.

Very truly yours,

Boeing Airplane Company
/s/ R. A. Newell, Asst. to Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 14

[Letterhead of Boeing Airplane Company]

Mr. E. M. Gardiner, Chairman January 29, 1953
Executive Committee, Seattle Professional Engineering Employees' Association
3121 Arcade Building, Seattle 1, Washington

Dear Mr. Gardiner:

This is in reply to your letter of January 27, 1953, in which you request a conference on the subject of the termination of Robert Pearson.

If you will telephone Mr. Esary or this office, such a conference will be arranged promptly.

Yours very truly,

/s/ A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 15

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. A. F. Logan February 6, 1953
Vice President—Industrial Relations
Boeing Aircraft Company

Dear Mr. Logan:

Your letter of January 7th, 1953 has been taken up at meetings of the Executive Committee and officers of SPEEA. It is the considered viewpoint of SPEEA that your proposal for salary increases continues to be objectionable and that any unilat-

eral action by Boeing to put them into effect at this time amounts in substance to an unfair labor practice.

It is our view that the proposed increases are so timed and planned that their effect would be to hamper SPEEA in the performance of its functions as a collective bargaining agency. Implicit in your letter is the view that the pending negotiations must be protracted, and that the increases you propose should be accepted because they can be made promptly. We take the view that the dispute as a whole can, and should be settled promptly; that the effect of any such partial adjustments in compensation would serve to delay rather than hasten completion of the pending negotiations.

Yours very truly,

/s/ E. M. Gardiner, Chairman
Executive Committee

RESPONDENT'S EXHIBIT No. 16

Mr. Charles Robert Pearson February 11, 1953
Seattle, Washington

Dear Mr. Pearson:

Seattle Professional Engineering Employees Association has requested a more particularized statement of the Company's reason for terminating your employment on January 27, 1953.

The entry on your termination slip is as follows:

"Refusal to answer questions relative to outside activities as employment agent."

In our opinion this statement summarizes the position taken by you at the conference between you and the undersigned on January 27, 1953, at which you were informed of the reason for your termination. By reason of the conference which preceded it, this entry was considered as adequate but, in response to SPEEA's request, this letter will serve to review the matter.

On January 23rd we were notified in letter form by SPEEA that that organization had started and intended to complete what SPEEA has referred to for several months as the "Manpower Availability Conference," and that it had retained an agency to arrange the interviews. With this letter was a printed copy of an invitation to this conference bearing a facsimile of your signature and indicating that you were a licensed and bonded employment agent acting as "Director Manpower Availability Service."

It was clearly apparent from this letter and invitation that SPEEA had started and intended to carry out a nation-wide solicitation of our business competitors, and others who compete with us in hiring engineers, in an effort to bring about a situation in which substantial numbers of engineers would leave the employ of this Company, for employment elsewhere.

It is obvious that even if there were an adequate supply of engineers at the present time, such a program would be against the best interests of Boeing Airplane Company. However, as you know, there is not an adequate supply of engineers at this

time; the Company is in serious need of more engineers and has been conducting an extensive nation-wide advertising campaign designed to fill this need. Thus, the invitation signed by you is part of a deliberate program which is very damaging to the Company.

For the purpose of determining whether you had authorized the use of what appeared to be your signature on the invitation and whether you were actually engaged in the program, we wired you on January 24, 1953, to arrange a conference on this subject.

You have your notes and the stenographic record of the conference on the 27th. After identifying the facsimile on the invitation as your signature, you in effect refused to answer further questions.

As your work in connection with the program is clearly against the best interests of the Company and in violation of your obligations as an employee, you were asked to elect either to give up your work as an employment agent or to leave the Company's employ. You refused to make such an election, leaving the Company no alternative but to terminate you.

It seems to us that while an employee continues at work, continues to draw salary from a company and is not on strike, it is no more than proper for that company to require that he do nothing intentionally which would have the effect of seriously damaging that company. On the other hand, it does not seem to us that an employer should be compelled to continue paying a salary to an employee

who engages in a deliberate program resulting in serious damage to the Company, whether or not his activities have been authorized or ratified by a collective bargaining organization of which he is a member.

For these reasons, your dismissal is considered proper.

Yours very truly,

A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 17

[Letterhead of Seattle Professional Engineering Employees Association]

James D. Esary, Jr. March 6, 1953
Labor Relations Manager
Boeing Airplane Company, Seattle, Washington

Dear Sir:

This is in reply to your letter of March 2, 1953, in which you reaffirm the offer contained in your letters of November 20, 1952 and December 26, 1952. The Executive Committee of SPEEA believes that the membership has clearly indicated that this offer is unsatisfactory. We therefore again reject this offer.

The Executive Committee has further considered the request of the Company to put into effect the increases mentioned in your letter of December 26, 1952, which guaranteed no prejudice to further

bargaining. We have agreed we would poll the membership of SPEEA to learn whether they wished to accept such an interim offer, if that offer included full retroactivity on overtime as well as on base rates. Without that provision, we cannot justify the time and expense of such a poll.

It is requested that you advise the Association before Monday night, if possible, if you have any further suggestions in this matter. We would like to give a full report on this to the membership meeting that night.

/s/ J. H. Goldie, Vice Chairman
Executive Committee

RESPONDENT'S EXHIBIT No. 18

[Letterhead of Boeing Airplane Company]

In reply refer to 403-VP-100 March 12, 1953

Seattle Professional Engineering Employees Association
3121 Arcade Building, Seattle 1, Washington

Gentlemen:

This will acknowledge receipt of your letter of March 6, 1953, in which you unqualifiedly reject our offer as set forth in our letters of November 20, 1952, and December 26, 1952, and last reaffirmed in our letter of March 2, 1953. We regret that you are unwilling to accept our offer or even to join in approving such increases on an interim basis.

For reasons previously outlined to you, we feel

compelled to place such increases into effect without prejudice to further negotiations, therefore these adjustments will be placed in effect forthwith.

Very truly yours,

/s/ A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 19

[Letterhead of Seattle Professional Engineering Employees Association]

Mr. A. F. Logan, Vice President April 8, 1953
Industrial Relations
Boeing Airplane Company, Seattle 14, Washington

Dear Mr. Logan:

This letter outlines our proposal for increases in the basic salary structure and base salary rates of Boeing employees under the jurisdiction of the Seattle Professional Engineering Employees Association and for a revised formula for computing the hourly rate for scheduled overtime work for such employees in "exempt" classification. This proposal is the same as the offer outlined in your letters dated June 27, 1952 and September 3, 1952 except that it has been modified to conform with the method used in computing the six percent rate increase presently in effect on an interim basis.

We propose that:

(a) Bi-weekly base salary rates and rate ranges be converted to weekly salary rates by dividing the

former by two; the resulting weekly rates and ranges then to be increased effective July 1, 1952, by six percent (to the next higher cent where fractional cents result), as is presently in effect on an interim basis, and

(b) The method of computation of the hourly rate for scheduled overtime work of employees in the "exempt" classifications be revised, effective July 1, 1952, from the previous "$3.00 an hour, or straight time, whichever rate is the greater" to time and one half on all base rates up to and including $100 weekly, and to straight time plus $1.25 an hour on all base rates above $100 weekly, and

(c) This proposed agreement shall have as its next anniversary date July 1, 1953, and

(d) This proposed agreement shall contain a sick leave clause substantially incorporating the pertinent portions of the existing Boeing Management Procedure No. 552 on the subject: "Sick Leave," and

(e) All other provisions of this proposed agreement shall be substantially those of the agreement in effect at the opening of the current negotiations, subject to detailed negotiations.

Very truly yours,

/s/ F. D. Frajola, Chairman
Executive Committee

FDF:vm

RESPONDENT'S EXHIBIT No. 20

403-VP-108 April 15, 1953 Mr. Esary

Mr. F. D. Frajola, Chairman, Executive Committee
Seattle Professional Engineering Employees
Association
3121 Arcade Building, Seattle 1, Washington

Dear Mr. Frajola:

This is in reply to your letter of April 8, 1953, in which you make certain proposals.

The 6% increase proposed in subparagraph (a) of your letter subject to the limitations set forth in the explanatory note contained in our letter to you of December 26, 1952, already is in effect.

With reference to your subparagraph (b), the method of computation of the hourly rate for scheduled overtime work of employees in the "exempt" classifications has been revised, as of January 2, 1953, but the Company is unwilling further to extend retroactively the effective date of such revised method.

The proposed anniversary date for a new contract of July 1, 1953, is unacceptable as we do not believe any constructive purpose would be served by writing a contract covering a period of only sixty days.

The Company, in a letter to your organization dated September 3, 1952, expressed its willingness to write into an agreement with SPEEA a sick leave clause substantially incorporating the pertinent portions of the existing Management Pro-

cedure No. 552 on the subject: "Sick Leave." We still are agreeable to such a clause.

The Company is ready to continue negotiations for a new contract and meet at all reasonable times with your organization for that purpose. As to your proposal (subparagraph e), the other provisions of any new contract will be determined by such negotiations.

Yours very truly,

A. F. Logan, Vice President
Industrial Relations

RESPONDENT'S EXHIBIT No. 21

[Letterhead of Boeing Airplane Company]

In reply refer to 405
Mr. F. D. Frajola May 6, 1953
Seattle Professional Engineering Employees Association
3121 Arcade Building, Seattle, Washington

Dear Mr. Frajola:

It has been some time since there has been a meeting between the Company and SPEEA negotiating committees and it is the purpose of this letter to suggest that such a meeting be arranged in the near fuuture at some mutually convenient time. Although we know of nothing that would indicate any recent change in the respective positions of the parties, it would seem, nevertheless, that such a meeting might be advisable, particularly in view of the fact that the personnel of your committee

has changed and there has been little discussion of the contract issues with the new committee. Moreover, there are several points in connection with the drafting of a new contract between the parties which are not thought to be of a controversial nature, but which must be worked out before any such new contract can be finalized.

A discussion of these points and the adoption of a plan for working out the related details might expedite the execution of a new contract at such time as the parties are able to resolve the more controversial issues.

If you also feel that such a meeting is desirable, please advise us so that a convenient time can be arranged.

Very truly yours,

/s/ Jas. D. Esary, Jr.,
JDE:bml Labor Relations Manager

RESPONDENT'S EXHIBIT No. 22

Notice

You will note that the enclosed check represents an increase in your pay of 6% as of March 13, 1953. On April 23, 1953, you will receive payment of the 6% increase in your base pay for the period July 1, 1952, through March 12, 1953, as well as any amount arising from an increase in the overtime compensation rate for "Exempt" classifications effective January 2, 1953. The new overtime rate for SPEEA "Exempt" employees is straight time

plus $1.25 an hour where the base salary is above $100 a week, and time and one-half on all salaries of $100 a week or less. The former rate was straight time or $3.00 an hour whichever was the greater.

These increases have been placed into effect without a new contract having been signed with your collective bargaining agent, SPEEA. This is less than the increase requested during the course of current negotiations, and is being placed into effect by the Company without prejudice in any way to the pending negotiations between the Company and SPEEA. Prior to placing these increases into effect SPEEA was advised and consulted, and SPEEA objected to the Company placing these increases into effect. The Company is hopeful of and looking forward to the execution of a collective bargaining agreement with SPEEA which will be mutually agreeable to the parties.

Boeing Airplane Company

RESPONDENT'S EXHIBIT No. 23

Copy Attachment No. 2

Headquarters, Eastern Air Procurement District,
67 Broad Street, New York 4, New York

Aircraft Industries Assoc. 26 April 1951
15th & H St., N. W., Washington 5, D. C.

Re: Manpower Controls and Hiring Practices.

Gentlemen:

Mandatory manpower controls are not now in

effect, but the National Manpower Mobilization policy as promulgated by the President on 17 January 1951 provides "Manpower controls will be used when and to the extent needed to assure successful execution of the mobilization program."

In order to maintain the present manpower policy which provides that any cooperative actions pertaining to recruitment and hiring of workers for the production of Government contracts be on a voluntary basis, it is necessary for Industry to avoid participating in any disruptive hiring practices. The hiring practices considered most disruptive are:

1. Hiring workers from outside the community before full use is made of locally qualified and available manpower.

2. Pirating workers from other essential activities.

3. Advertising indiscriminately for manpower.

4. Establishing specifications for workers which are higher than the minimum requirements for the work.

5. Hiring a greater number of workers than needed or than can be readily absorbed within a reasonable period of time.

The Aircraft Industry is urged not to participate in any of the disruptive practices mentioned above.

Very truly yours,

/s/ Arthur Thomas, Brigadier General,
USAF, Commanding

JGB/mfh

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 19th Region in the matter of Boeing Airplane Company, Seattle Division were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY
Official Reporters
By BERNICE M. JACKSON REPORTING CO./NL
Field Reporter

No. 14540

United States Court of Appeals

For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR REVIEW OF AND TO SET ASIDE, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

HOLMAN, MICKELWAIT, MARION,
BLACK & PERKINS

DEFOREST PERKINS
WILLIAM M. HOLMAN
ROBERT S. MUCKLESTONE
Attorneys for Petitioner.

1006 Hoge Building,
Seattle 4, Washington.

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INDEX

TABLE OF CASES

STATUTES

United States Court of Appeals
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BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR REVIEW OF AND TO SET ASIDE, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Listed below are certain abbreviated references used herein:

Boeing Airplane Company, a corporation, petitioner	Boeing, or, Company
National Labor Relations Board, respondent	Board
Seattle Professional Engineering Employees Association, a labor organization	SPEEA, or, Union
National Labor Relations Act, as amended (61 Stat. 136, 137, 139, 140, 146, 150-152; 65 Stat. 601; 29 U.S.C. §§151-168)	Act
Intermediate Report and Recommended Order of Trial Examiner, dated December 28, 1953	Recommended Order
Decision and Order of Board, dated September 30, 1954	Board Order
Page references to printed Transcript of Record	R. .....

I.

Statement of Pleadings and Facts Concerning Jurisdiction of The Board and Jurisdiction of The Court

The statutory provisions believed to sustain the jurisdiction of the Board to enter the Board Order here sought to be reviewed, and the pleadings and facts necessary to show the existence of such jurisdiction are as follows:

(1) *Statutory provisions.* The Act (61 Stat. 136, 137, 139, 140, 146, 150-152; 65 Stat. 601; 29 U.S.C. §§151-168); particularly §§10(a), (b), (c), 61 Stat. 146, 62 Stat. 991, 29 U.S.C. §160, contains the statutory provisions sustaining the Board's jurisdiction.

(2) *Pleadings.* Paragraphs I and II of the Board complaint state the facts relative to the Board's jurisdiction and describe the nature of the Company's business and the interstate and commercial aspects thereof (R. 7). Paragraphs I and II of the Company's answer admit such paragraphs of the complaint (R. 14).

(3) *Facts.* The facts pertinent to the Board's jurisdiction are: The Company is a Delaware corporation, maintaining its principal office at Seattle, Washington. It operates plants in Wichita, Kansas and in Seattle and Renton, Washington, at which it is engaged in the manufacture of aircraft and aircraft parts. In the course and conduct of its business, and at all material times the Company purchased for use in its Seattle and Renton plants, materials, supplies and equipment originating outside of the State of Washington valued in excess of $1,000,000 annu-

ally; it manufactures and sells to agencies of the United States Government and to operators of commercial airlines, aircraft and aircraft parts valued in excess of $1,000,000 per year. No contention is made that at such times the Company was not involved in commerce and business activities affecting commerce, within the meaning of those terms as defined in the Act (R. 7, 14, 26).

The statutory provisions believed to sustain the jurisdiction of this Court to review the Board Order in question and the pleadings and facts necessary to show the existence of such jurisdiction are as follows:

(1) *Statutory provisions.* Section 10(f) of the Act, 61 Stat. 146, 62 Stat. 991, 29 U.S.C. §160; and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §1001, *et seq.* (particularly 60 Stat. 243, 5 U.S.C. §1009) contain the statutory provisions sustaining the Court's jurisdiction.

(2) *Pleadings.* The petition for Review of and to Set Aside, in Part, an Order of the National Labor Relations Board, filed with this Court October 7, 1954 (R. 154-62) (particularly paragraph 2 thereof) states the facts relative to the Court's jurisdiction.

(3) *Facts.* The facts pertinent to the Court's jurisdiction are as stated in the preceding paragraph relating to the Board's jurisdiction.

II.

Statement of Case, Question Involved, and Manner in Which Raised

This case presents for the Court's review the sole question as to whether Boeing violated the Act on

January 27, 1953, by discharging from its employ one Charles Robert Pearson on that date.

The Trial Examiner, after an exhaustive analysis of the facts and applicable law, found the discharge properly to be within the Company's prerogative and recommended dismissal of the complaint in its entirety (R. 111). Three members of the Board concluded otherwise and considered the discharge to constitute a violation of the Act (R. 139). Two members, dissenting, found that the discharge did not violate the Act (R. 148). On the basis of the majority opinion the usual elaborate form of Board order issued on September 30, 1954, which order would require the Company to "cease and desist" from: "discouraging membership in [SPEEA], or in any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment; in any like or related matter interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist [SPEEA], or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, * * * " (R. 143). The order would further require the Company to "make whole" Pearson for any loss of pay occasioned by the discharge, and to post the usual Board form of notice which would in effect publicize to the Company's employees that it has been guilty in these

various respects and would further cause the Company to publicize what would amount to a promise on the part of the Company to rectify such stated violations (R. 148-150).

The Board Order dismissed all of the other contended violations of the Act alleged in the complaint—that the Company had refused to bargain in good faith in connection with Pearson's discharge, that it had refused to bargain in good faith in connection with a unilateral salary increase mentioned in the Record; and even the majority, in finding that the discharge constituted a violation, stated that the discharge "resulted from the [Company's] good faith but mistaken belief as to its rights under the Act" (R. 140). Review is sought only in respect of the part of the Board Order (predicated on such majority opinion) relating to the stated illegality of the discharge.

The question presented for review is in essence one of law in that the Record shows no factual issue of moment. There is no question but that Pearson was discharged for the activities regarded respectively as "protected" and as "unprotected" by the majority and minority Board opinions. There is no significant dispute as to the nature of these activities (R. 27, 131), although certain aspects thereof have been, in our view, either overlooked completely or unduly underemphasized by the majority. Accordingly, the question can be restated as one of law: Must the Act be construed as extending to employees the right to engage with impunity in activities of the type that occasioned Pearson's discharge, thus to compel an employer to retain in its

employ and continue to pay full compensation to an individual so engaged?

The Record, insofar as it bears on this question and is descriptive of the nature of the activities involved, is now summarized.

SPEEA, representing some 3,500 non-supervisory engineers at the Company's Seattle Division (R. 388), and the Company engaged in collective bargaining negotiations for a new contract throughout the period subsequent to April 7, 1952 (R. 10, 15, 519, 521) until the time of the hearing before the Trial Examiner which took place June 23, 24 and 25, 1953 (R. 25) and as of the latter time the parties had been unable to reach agreement (R. 22). The previous contract had expired in August of 1952 and (except for the salary increase of March 12, 1953 mentioned in the Record) the conditions of the old contract were continued by the Company during the period of negotiations (R. 388). The General Counsel made no contention that the Company had refused or failed to meet the standards of good faith bargaining set by the Act, except solely in respect of Pearson's discharge (see complaint R. 6-14, and R. 461), and in the latter respect the Trial Examiner, the Board majority and the Board minority each concluded that the Company had fully discharged the duty to bargain in good faith (R. 106, 140, 148). The relations of the parties, dating back to SPEEA's certification in 1946 (R. 386) had been at all times amicable (R. 27, 387).

As early as 1951 an executive group within SPEEA set up an "Action Committee" specifically designated

to originate and develop plans for various types of action to be taken in order to bring "pressure" on the Company (R. 31). Among the plans proposed or suggested by such committee was a course of action that has been labeled in the Record, in the interests of brevity, the Manpower Availability Conference, or MAC. This was the plan eventually put into action, to the exclusion of the others, and Pearson's connection with it was the reason for his discharge. However, it is considered pertinent (the Trial Examiner did not agree —R. 101) to point out that the plan was conceived and publicized to Union members and the Company along with such associated proposals as: mass refusals to punch timeclocks; mass refusals to work overtime; "arrangement" of simultaneous medical or dental appointments to bring about sporadic mass absences; intermittent work stoppages; union meetings during working hours; and action calculated to "neutralize" the Company's recruitment campaign in various colleges and universities by discouraging potential new hires from coming to Boeing for employment (R. 100, 240, 245-6, 334-9, 345-6, 370).

These associated plans of action as well as the MAC were publicized over an extended period to SPEEA members and also were, during such period, publicized to the Company as a matter of regular Union practice during the period of bargaining heretofore mentioned, and during such period constituted a continuing threat to the Company (R. 261, 351-2, 388, 415-6, 418). As mentioned, only the course of action identified as the MAC eventually was undertaken and the other pro-

posals were not; but mention of such other proposals is considered pertinent as being descriptive of the background of the general situation leading up to Pearson's discharge, as tending to show the *nature of the primary intended result* of the MAC and as affording evidence on the point later discussed in the Argument as to whether SPEEA approached the 1952-3 negotiations in the manner and with the degree of good faith required by the Act.

In short, the MAC consisted of a plan, the primary intended result of which was to induce and encourage substantial numbers of the Company's engineers to leave the Company's employ, for employment with other firms, in order to so incapacitate and damage the Company as to force it to capitulate to the Union's demands; and to accomplish this by a means that would involve none of the risks of a strike (R. 343-4) and that would in the meantime preserve complete job security and full compensation to each employee without any risk whatever. (Other purposes were also ascribed by Union leaders to the MAC—to obtain data concerning the "market value" of engineers and to provide a meeting place where prospective employers could be contacted on an exploratory basis (R. 32, 477), but when the entire Record is weighed, such purposes can only be regarded, if at all, as inconsequential and as collateral and incidental to the primary intended result, stated above.)

Pursuant to the MAC "plan of action" most of the firms in the United States known by the Union to employ engineers (around 2,800) were to be contacted,

informed that a substantial number of engineers were available for employment, and invited to send representatives to Seattle for the purpose of interviewing and hiring such engineers (R. 197-8, 478). The plan was designed solely for Boeing engineers and participation therein was limited to them (R. 37, 267). In the description of the plan prepared by the Union committee that conceived and designed it, a stated purpose of the plan was candidly represented to be "To *encourage* engineers to seek more suitable employment elsewhere" (R. 368) (emphasis added). Extensive publicity was given to the plan in the Union newspaper and other Union publications over a considerable period of months preceding its activation (R. 261, 337, 351). The Union leadership distributed to SPEEA members a ballot (R. 481-2) intended to secure an expression from the membership as to the willingness of members to participate in such course of action. The publicity accompanying such ballot, in the form of a report, characterized the MAC as a "*punitive* action to reduce the Engineering services available to Boeing" (R. 33, 478) (emphasis added). It also represented to the membership that the publicity attendant upon the MAC would have a "*punitive*" action to discourage new hires from coming to Boeing (R. 32-3, 477-8) (emphasis added). It listed various questions in the nature of anticipated possible employee objections to the MAC and then answered such questions in a manner calculated to quiet any reluctance on the part of the membership in these respects (R. 34-5).

Only 871 ballots were returned and on such ballots

516 employees indicated an intention to participate, 355 employees declined to participate; and of the 516 employees, 420 indicated that they did "not necessarily desire" to leave the Company's employ (R. 35). There were at the time approximately 3,500 in the collective bargaining unit represented by the Union (R. 388) and of these approximately 2,100 were members of the Union (R. 35, 310). Fifty-nine per cent of the Union membership (seventy-five per cent of those in the bargaining unit) did not vote at all.

Throughout, the Union was well aware of the fact that engineers were in critically short supply (R. 360), and of the potential damage to the Company inherent in activating the MAC plan of action (R. 419-20).

The Union leadership proceeded with preparations for the MAC. A Union sub-committee was designated to search for suitable halls to rent and to provide furniture and equipment to handle the anticipated interviews with representatives of other firms (R. 485). Another sub-committee was designated to compile, print and distribute suggestions for interviewers; to arrange and schedule private interviews between engineers and other employers; to distribute and collect "offer data cards" and accept "acceptance data cards"; to make final arrangements, including determination of the date and issuance of invitations to the press; and to obtain an employment agency license from the City of Seattle for use in connection with the MAC (R. 485).

Bargaining negotiations continued through the fall of 1952 into the early part of 1953 without agreement being reached and early in January of 1953, Pearson,

in charge of the MAC, sought and secured the employment agency license mentioned above and other preparations were made (R. 43, 200-1).

On or about January 23, 1953, the MAC plan of action was put into effect at which time letters over Pearson's signature were mailed to more than 2,800 firms throughout the United States, in the following form:

"[Letterhead of Seattle Professional Engineering Employees Association]

"Are you in Need of Additional Engineers?

"The Seattle Professional Engineering Employees Association, with a membership of 2,300, invites your Company to participate in a Manpower Availability Conference to be held in Seattle about March 9th, 1953. The purpose of the Conference is to put employers of engineers in contact with those of our members who are available for new positions.

"Over 500 engineers, scientists and industrial mathematicians are pledged to attend the Conference. Represented in this group are men of assorted lengths of experience and types of training as is portrayed by the attached graphs. A distinction between men who are actively seeking new connections and those whose interest is more dependent upon the advantages of other situations will be noted in the make-up of the graphs.

"These engineers are looking for more than a change of scenery. They are employed engineers who feel they would be capable of greater accomplishment in positions where engineering talents are directed more specifically to engineering work and where credit for individual effort and recognition of engineering excellence are more general.

They seek a working climate where their training and ability will be more fully utilized and in which compensation is in proportion to talent and productiveness.

"In order to provide a better understanding of the type of conference which is contemplated, a general outline of its operation might be of interest. It is planned that the Conference will be conducted in two separate phases.

"The first phase will provide the means of quickly and efficiently arranging interviews beween the five hundred engineers and the participating companies. This will be accomplished by conducting exposition-like meetings on as many consecutive evenings as appears necessary. At this time, the engineers, perhaps accompanied by their wives, will visit the various booths, which are to be provided for each of the participating companies.

"The representatives of each company will here have the opportunity to address groups of engineers, to explain the company's needs and the advantages of employment with it, and to distribute descriptive literature and application blanks to those who are interested. Secretaries at a centrally located Association booth will then make appointments for private interviews.

"Providing an opportunity for the participating companies to show a limited number of motion pictures is under consideration. The Association will provide ditto and mimeograph facilities for any duplicating the company representatives may require. An augmented Association secretarial staff will also be at their disposal.

"The second phase of the Conference will consist of individual private interviews. These

interviews may be conducted in the hotel rooms of the company representatives or, if it is desired, the Association will provide other suitable facilities.

"Inasmuch as these engineers are seeking particular situations wherein their experience and capabilities are most fully utilized, it is recommended that the participating companies send engineering representatives who can accurately present detailed job requirements and describe the conditions of employment on the company's engineering staff. These representatives should come prepared to make firm offers when they interview engineers meeting their requirements.

"It is planned that the Conference will be self-liquidating. For this reason, each company will be asked to pay a registration fee of $25 and an additional fee of $10 for each engineer hired as a direct result of the Conference. These fees may be rebated on a pro rata basis if the costs of the Conference are appreciably less than the fees collected. Each engineer who accepts a position as a result of the Conference will be charged a fee of $15.

"To insure adequate preparation for the Manpower Availability Conference, commitments to attend will be accepted until February 6, 1953. Answers to the questions appended to this invitation will aid the Association in its planning for the Conference. Receipt of acceptances of this invitation will be acknowledged in a subsequent letter which will announce the date and supply additional details.

Yours very truly,
/s/ Chas. Robt. Pearson,
Director Manpower Availability Service (Licensed and Bonded Employment Agent)

"How many engineers do you need?

"How many representatives will you send?

"Would you like for the Association to make your hotel reservations? What accommodations are desired?

"What special facilities would you wish the Association to supply? Please note that individual sound amplification systems will not be permitted." (R. 486-9)

To each of these letters was attached an exhibit (R. 491) purporting to indicate the number of engineers and their qualifications who were "planning to leave present employment" or "who seek a more attractive situation."

The Company was first advised of the activation of the plan by the following letter from the Union:

"[Letterhead of Seattle Professional Engineering Employees Association]

"Correct Address:
3121 Arcade Bldg., Seattle 1, Wn.

"Mr. A. F. Logan, Vice President
Industrial Relations, Boeing Airplane Co.
Seattle 14, Wn.

"Dear Sir:

"1. This is to advise you that SPEEA has started and will complete a Manpower Availability Conference.

"2. Various companies are to be invited to come to Seattle to interview those SPEEA members who have expressed a desire to entertain offers of employment.

"3. This conference is being conducted for the following purposes:

"(a) To provide members with improved opportunities to bargain for their services. Our membership has requested SPEEA to restore the freedom and privacy of engineers who seek to improve their situations by changing employers.

"(b) To obtain data on the true market value of engineers with various amounts of experience.

"4. In offering this service to its members, SPEEA has retained an agency for bringing together those engineers and companies who may care to discuss employment possibilities. SPEEA offers no special inducement to engineers to terminate, nor does it enter in any way into negotiations between the companies and the engineers.

Very truly yours,

/s/ E. M. Gardiner, Chairman
Executive Committee.

Rec'd 1/23/53." (R. 493-4)

At the time of receiving this letter the Company had no idea that the "agency" to which reference is made in the 4th paragraph of the letter and which had been "retained" by SPEEA, was Pearson (R. 44, 413).

A copy of the letter captioned "Are You in Need of Additional Engineers" (R. 486-491) was brought to the attention of A. F. Logan, Company officer in charge of industrial relations, about the same time (R. 413-4). Logan had no personal knowledge of the fact that Pearson was a Boeing employee but upon learning this, Logan asked that Pearson return from assignment in Los Angeles so that Logan could talk to him (R. 414). In the ensuing discussion between Logan and Pearson (R. 494-9) Pearson was identified as the signatory of the letter of invitation and as the "Licensed and Bonded

Employment Agent'' mentioned therein, and after having been given by Logan the choice of foregoing his activities in connection with the MAC or terminating his employment with the Company, and having declined to state a choice, he was terminated.

Thereafter, the Company was informed that only eighteen replies to the MAC invitation had been received by SPEEA, and that the MAC was considered to have failed in its objectives and was to be abandoned (R. 53, 253, 323). Also, after various negotiations with SPEEA on the subject of Pearson's discharge and after the Union had stated to the Company in writing that it would ''recommend rejection of *any* offer made by the Boeing Airplane Company until such time as * * * Pearson is reinstated unequivocally'' (R. 513) (emphasis added), Pearson was reinstated by the Company to his former position without prejudice, and with all of the rights and privileges acquired by him prior to his termination, in order to remove the incident as a stumbling block to further contract negotiations (R. 54, 134, 237, 323, 422, 514-9). He was employed by SPEEA in the interim, suffered no loss of income (R. 315) and no such loss was claimed (R. 516). Also in the interim, Pearson continued as MAC chairman (R. 252) and his discharge had nothing whatever to do with its failure (R. 253-4).

On April 20, 1953, the charge appearing on pages 3 to 5 of the Transcript of Record was filed against the Company by SPEEA. On June 3, 1953, the Regional Director issued the Complaint against the Company appearing on pages 6 to 14 of the Transcript of Record.

Thereafter the Company filed its answer, denying that it had violated the Act in any way, and charging therein that the Union had refused to bargain in good faith as required by the Act in connection with the organization, promotion and operation of the MAC (R. 14-9). The hearing before the Trial Examiner occurred in Seattle, Washington, June 23, 24 and 25, 1953 (R. 25) and the Recommended Order of the Trial Examiner issued December 28, 1953 (R. 111). Certain exceptions to the Recommended Order were filed by all parties (R. 116-30), and the Board, after denying all requests for oral argument (R. 130-1), issued the Board Order, as stated, on September 30, 1954 (R. 130). The petition for review was filed in this Court October 7, 1954.

After Pearson's reinstatement and during the period up to and including the time of the hearing before the Trial Examiner, SPEEA and the Company were continuing to negotiate for a new contract (R. 394-5).

III.

Specification of Errors

The basic errors upon which the Company relies are the errors of the Board in finding that the Company had violated the Act in discharging Pearson, and in failing to find that the Union's conduct in connection with the MAC amounted to a violation of the duty imposed by Section 8(b)(3) and 8(d) of the Act to bargain in good faith. The errors designated below are correlative to these basic errors but in accordance with Rule 18(d) are specified as follows:

(a) The failure of the Board to find merit in the

Company's exceptions numbered 1 to 9, inclusive, to the Recommended Order.

(b) The failure of the Board to find the Union-sponsored MAC, to which reference is made in the Board Order, to be an unprotected activity under the Act.

(c) The refusal of the Board to find that the activities of SPEEA and its members in connection with the MAC—at a time when the parties were engaged in collective bargaining negotiations—constituted an unfair labor practice and a refusal to bargain in good faith on the part of SPEEA in violation of Section 8(b)(3) of the Act, and to find therefore that such activities could not at the same time have been protected activities under the Act.

(d) The finding by the Board that the MAC did not contravene the policies of the Act.

(e) The finding by the Board that the MAC constituted merely "a conditional threat that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bargaining demands."

(f) The finding by the Board that the MAC "was directly related to matters of collective bargaining in issue between the Respondent and the Union" rather than finding that, at and subsequent to the time of its activation, it was a device to bring about a permanent exodus of a substantial number of the Company's employees to other employers.

(g) The refusal of the Board to find that the conduct of SPEEA and of Pearson in connection with the MAC

was indefensible and improper with respect to the Company.

(h) The finding by the Board that the company discriminated against Pearson to discourage Union membership and activity.

(i) The finding by the Board that the Company interfered with, restrained or coerced its employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) and in finding that the Company was in violation of Section 8(a)(3) of the Act.

(j) The finding by the Board that the remedy of back pay is appropriate and will effectuate rather than contravene the policies of the Act.

(k) The finding by the Board that Pearson's discharge was improper, particularly after finding that the Company had discharged its duty to bargain in good faith concerning such discharge.

(l) The direction by the Board that the Company post the notice, a copy of which is attached to the Board Order as Appendix A.

IV.

Argument

Summary: Pearson's discharge was proper because the activities for which he was discharged are not protected by Section 7 of the Act; his discharge was proper because the activities for which he was discharged were part of a pattern of conduct that amounted to a refusal to bargain in good faith on the part of the Union as required by Sections 8(b)(3) and 8(d) of the Act; and

his discharge was properly "for cause" under Section 10(c) of the Act.

* * *

1. Pearson's discharge was proper because the activities for which he was discharged are not protected by Section 7 of the Act.

The majority Board opinion is premised on a broad, and in our view wholly unwarranted, interpretation and application of Section 7 of the Act (Sections 8(a)(1) and 8(a)(3) are involved only because of the majority's position in respect of Section 7) (R. 139-40).

The language of Section 7, insofar as pertinent, is as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *."

Were the language of this Section to be considered without further reference to the context of the Act, a literal reading might suggest an extension to employees of the right to engage unhindered and with impunity in any and all "activities" if "concerted" and if engaged in for the purpose of "mutual aid or protection."

On such theory, any activity involving two or more employees, and irrespective of the means used or the circumstances involved, would be deemed clothed with the Section's protection if the ultimate purpose is

found to be "mutual aid or protection." The language does not distinguish between "legal," "defensible," "proper" or "loyal" activities on the one hand, and "illegal," "indefensible," "improper" or "disloyal" activities on the other. It contains no definition that would exclude from its protection concerted activity even though such activity be in the form of slowdown, sitdown strike, wildcat strike, intermittent strike, damage to business or to plant and equipment, trespass, violence, refusal to accept work assignment, disloyalty, mass picketing, physical sabotage, refusal to obey rules, insistence on working on employees' terms or the like.

Although Congress did not undertake an express and specific definition of the "concerted activities" afforded protection under Section 7, it is clear, when the Act is studied in its entirety and its legislative history considered, that a broad interpretation of the term is neither required nor was it intended.

First, there is nothing in the broad statements of policy found in Section 1 of the Act that compels or even infers congressional sanction of the broad interpretation of Section 7 adopted by the Board majority. These statements, which in effect set forth the reasons considered by Congress as justifying and compelling such legislation, clearly support the idea that the type of right intended to be protected by the Act is one conducive to "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions * * * " (Act, Section 1, third paragraph).

Then, the context of the language of Section 7 affords

some key to the restricted scope of the section intended by Congress. As stated in *Joanna Cotton Mills v. N.L.R.B.*, 176 F.2d 749, 752 (CA-4, 1949):

> "The words 'concerted activities' are limited in meaning by the words with which they are associated (noscitur a sociis), which have relation to labor organization and collective bargaining, and by the purpose of such 'concerted activities,' which is expressly limited by the immediately succeeding language to concerted activities 'for the purpose of collective bargaining or other mutual aid or protection.' "

Again, Section 8 imposes the duty upon employers and unions alike "to bargain collectively," that is, to perform "the mutual obligation * * * to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder" (Act, Sections 8(a)(5), 8(b)(3), and 8(d)). The "concerted activities" to which reference is made in Section 7 must be measured in the light of the affirmative duties imposed upon the parties by Section 8.

Further, the Act specifies that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for *cause*" (Act, Section 10(c)) (emphasis added). It is to be noted that this provision relates to "any individual," affords no distinction as between individuals acting alone or in concert, and expresses no limitation as to the word "cause."

Additional indication that restriction of the term "concerted activities" in Section 7 was intended by Congress is the fact that it was considered necessary or advisable to make specific reference to the traditional concerted activity, the strike: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right" (Act, Section 13).

As to historic background, we quote the statement of the Trial Examiner in the Recommended Order (R. 67-8):

> "In connection with the 1947 amendment of the Act, Congress, too, made its position clear with respect to the limitations which ought to be imposed upon 'protected' concerted activity. In the *House Conference Report* (No. 510, 80th Congress, pp. 38-39) on the statute as amended, reference is made to certain early Board decisions that the language of the original Act protected concerted activities regardless of their nature or objectives. The conference report pointed out that these Board decisions had not received judicial approval—and went on to say that:
>
> " ' * * * the courts have firmly established the rule that under the existing provision of Section 7 of the National Labor Relations Act, employees are not given any right to engage in *unlawful or other improper conduct.* In its most recent decisions the Board has been consistently applying the principles established by the courts * * *
>
> " 'By reason of the foregoing, it was believed that the specific provisions in the House Bill ex-

cepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of Section 7 were unnecessary. Moreover, there was real concern that the inclusions of such a provision might have a limiting effect and make *improper conduct* not specifically mentioned subject to the protection of the act.

" 'In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these *undesirable concerted activities* are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. (Emphasis supplied)' "

And at the times that the Act was amended in 1947 and again in 1951 numerous decisions of the Board and of the Courts, some of which are hereinafter cited, had determined certain activities to be unprotected. With knowledge of these decisions, Congress did not amend or expand the scope of Section 7 and it continues to remain in the form originally enacted as part of the Wagner Act in 1935.

As of the present time various concerted activities have been determined by the Board and by the Courts

to be unprotected under Section 7. The characterization of such conduct has ranged from "illegal," *N.L.R.B. v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 83 L.Ed. 627 (1939), to "unlawful," *N.L.R.B. v. Kelco Corp.,* 178 F.2d 578 (CA-4, 1949), "improper," *Pacific Telephone Co.,* 107 NLRB No. 301, 33 LRRM 1433 (1954), *International Union, et al. v. Wisconsin Employment Relations Board, et al. (Briggs & Stratton),* 336 U.S. 245, 93 L.Ed. 651 (1949), "indefensible," In re *Jefferson Standard Broadcasting Co. and International Brotherhood of Electrical Workers,* 94 NLRB No. 227, 28 LRRM 1215 (1951), and "disloyal," *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.),* 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953), *Montgomery Ward & Co.,* 108 NLRB No. 152, 34 LRRM 1123 (1954).

And in the House Conference Report (No. 510, 80th Congress, pages 38-39) it is to be noted that "unlawful," or "improper," or "indefensible" are the terms used in referring to concerted activities that were intended to be left unprotected.

The concerted activities that have been found to derive no protection under Section 7 have included "hit and run" strikes, *Pacific Telephone Co., supra; Textile Workers, CIO (Personal Products Corp.),* 108 NLRB No. 109, 34 LRRM 1059 (1954); intermittent work stoppages, *International Union, et al. v. Wisconsin Employment Relations Board, et al. (Briggs & Stratton), supra;* part time strikes, *Honolulu Rapid Transit Co.,* 110 NLRB No. 244, 35 LRRM 1305 (1954); partial strikes, *Valley City Furniture Co.,* 110 NLRB No. 216,

35 LRRM 1265 (1954); *N.L.R.B. v. Draper Corporation,* 145 F.2d 199 (CA-4, 1944); refusals to work on employer's terms, *N.L.R.B. v. Massey Gin & Machinery Works, Inc.,* 173 F.2d 758 (CA-5, 1949); "slow downs," *Elk Lumber Co.,* 91 NLRB No. 60, 26 LRRM 1493 (1950); *Phelps Dodge Copper Products Corp.,* 101 NLRB No. 103, 31 LRRM 1072 (1952); *Textile Workers, CIO (Personal Products Corp.), supra;* disloyalty, *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), supra;* sabotage, *Mt. Clemens Pottery Co.,* 46 NLRB No. 714, 11 LRRM 225 (1943); and violation of employment contract, *Washington National Insurance Co.,* 64 NLRB 929, 17 LRRM 154 (1945), to mention some.

The terms "disloyal," "unlawful," "improper," "indefensible," and "illegal," are broad terms and the decisions have suggested no particular limitation to their scope. No case has been found involving circumstances that parallel exactly the circumstances in the instant case, but it is urged with all possible emphasis that each of these terms applies to the activities that occasioned Pearson's discharge.

The most recent announcement of the United States Supreme Court on the subject was in *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), supra,* discussed both in the majority and minority Board opinions, the Supreme Court in that case stating (346 U.S. 464, at 472, 476):

> " * * * There is no more elemental cause for discharge of an employee than disloyalty to his

employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that co-operation, *continuity of service* and cordial contractual relation between employer and employee that is born of *loyalty to their common enterprise.*

" * * *

" * * * It [the employees' conduct] was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability." (R. 146-7) (emphasis added)

In *International Union, et al. v. Wisconsin Employment Relations Board, et al. (Briggs & Stratton), supra,* the Supreme Court expressed the following view (336 U.S. 245, at 257):

"In the light of labor movement history, the purpose of the quoted provision of the statute [Section 7] becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect inter-state commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. *But because legal conduct may not be made illegal by concert, it does*

not mean that otherwise illegal action is made legal by concert." (emphasis added)

The Court of Appeals for the 8th Circuit in *N.L.R.B. v. Montgomery Ward & Co., Inc.,* 157 F.2d 487, 496 (CA-8, 1946) said:

"It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders *and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service,* and carefully discharge their duties to the extent reasonably required." (emphasis added)

The Court of Appeals for the 7th Circuit in *C. G. Conn Limited v. N.L.R.B.,* 108 F.2d 390, 397 (CA-7, 1939) said:

" * * * *We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously.* We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance. * * *

" * * *

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the

hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (emphasis added)

The Court of Appeals for the 6th Circuit in *Hoover Co. v. N.L.R.B.,* 191 F.2d 380, 386 (CA-6, 1951) said:

" * * * The Act does not confer absolute right upon employees to engage in every kind of strike or other concerted activity; and the fact that certain concerted activity is explicitly protected by the statute, does not mean that improper concerted activity is also protected. For it is not necessary that such improper activities be explicitly excepted from the protection of the statute. The rights set forth in the Act are not to be considered as including the right to commit or participate in unfair labor practices or unlawful concerted activities; and the courts have firmly established the rule that under the provisions of Section 7 of the Act, employees are not given any right to engage in unlawful or other improper conduct. International Union, Auto Workers, v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651."

and at page 389:

" * * * *He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business.*" (emphasis added.)

and at page 390:

"Of course, an employee can engage in 'concerted activity for mutual aid and protection' even though it may be highly prejudicial to his employer, and results in his customers' refusal to deal with him, just as long as such activity is not a

> wrong done to the company. * * * It is a wrong done to the company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required, under the Act, to finance a boycott against himself."

Let us examine the course of action identified as the MAC in light of these statements. Assuming for the purposes of argument that the ultimate long range objective of the MAC may have been to obtain higher salaries or better working conditions for certain individuals, in the employ of Boeing or in the employ of some other employer, there can be no doubt but that the *primary intended result of the means used was to effect severe damage on the Company, while at the same time employing a technique that would permit all employees, including the union leaders sponsoring the action, to continue to draw pay and retain complete job security.*

The majority Board opinion glosses over the matter of the primary intended result of the MAC and the potential damage to the Company involved therein, and purports to regard the damage potentially resulting from the *means* (MAC) used by SPEEA as meriting no important consideration. The majority in effect reasons something like this:

> The means used in a concerted activity and the consequences resulting from such means are unimportant and immaterial to the determination of the "protected" nature of the activity. The con-

> certed activity is to be tested on the basis of its ultimate long-range objectives alone and so long as those objectives are "mutual aid or protection" or "to secure other employment" or "for purposes of collective bargaining," the activity is protected under Section 7 and the means used are of negligible consequence. (See R. 134-5).

This dubious reasoning would render "presumptively lawful and protected" (R. 135) about all of the activities that the courts have found to be unprotected including activities of the type mentioned on page 21 of this brief.* The majority then attempts to substantiate this position by stating:

> "The classic example of a protected concerted activity—a strike—obviously may result in serious financial loss to the affected employer" (R. 135).

The majority Board opinion—in attempting to find an analogy in the strike (in which the primary intended result of the means used is to inflict economic damage

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* As to the *Peter Cailler Kohler* case (*N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.,* 130 F.2d 503 (CA-2, 1942)) cited by the Board majority in support of this position, the decision is premised on the idea that an activity can be unprotected only if it is "unlawful" (a theory long since obsolete, particularly in view of the decision of the Supreme Court in the *Jefferson Standard* case). Moreover, the decision arose out of occurrences that took place seven years prior to the amendments to the Act in 1947 which for the first time imposed various obligations upon unions, including the duty to bargain in good faith and to refrain from the other unfair labor practices defined in Section 8(b). Further, the employee discharged in the *Peter Cailler Kohler* case was not engaged in any activity, concerted or otherwise, where the primary intended result of the activity was to effect damage on the employer.

upon an employer)—completely overlooks the fact that such intended result does not involve a simultaneous attempt to damage the employer severely *and draw pay and maintain job security at the same time.* It also overlooks the fact that in the case of an economic strike (as distinguished from a strike precipitated or prolonged by an unfair labor practice on the part of the employer) the employer has the right to replace strikers and is under no duty to re-employ such replaced strikers, *N.L.R.B. v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); *Sax v. N.L.R.B.,* 171 F.2d 769 (CA-7, 1948).

The majority opinion further ignores other vital differences between a strike and the MAC plan of action. A legitimate strike is under the direct control of the union and can be terminated at the union's instance. Once such a course of action as the MAC has progressed to the point where mass terminations have taken place, the union is without control and cannot re-establish the normal employment relationship. The employees have gone. Terminations pursuant to an MAC type of action are permanent. Absences in connection with a strike are temporary. The potential ultimate damages resulting from the activities here involved are of a magnitude far in excess of those resulting from a strike, and the former type of damage is largely irreparable.

The majority Board opinion also takes the tack that "There was here in essence only a *conditional threat* that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bar-

gaining demands * * * " (R. 137). (emphasis added). The Record simply does not support this statement. At the time of Pearson's discharge the MAC was organized far beyond the point of a mere "conditional threat." Arrangements for accommodations and other features of the plan had been made. Invitations had been mailed out to 2,800 other firms employing engineers. The invitation sent to these firms in no way indicated that the holding of the conference was conditional or would be called off if Union demands were met by the Company. The letter written by the Union to the Company that accompanied a copy of the invitation sent to other firms stated unequivocally: "This is to advise you that SPEEA *has started and will complete* a Manpower Availability Conference" (R. 493) (emphasis added). Further, in this case Pearson was not in the position of an employee who was making a threat or conditional threat to quit his job; rather Pearson was in the position of heading up a plan of action designed to facilitate and encourage *others* to leave their employment, while he at the same time was making every possible effort (witness these proceedings) to retain *his* job, and to retain all seniority and other rights in respect thereof, and to continue to receive his pay check. The right to quit does not extend to an individual or group the right to encourage or facilitate *permanent terminations*. The difference is fundamental.

The majority Board opinion also contends that the instant case must be distinguished from the *Jefferson Standard* case because the MAC "was directly related to matters of collective bargaining in issue between the

Respondent and the Union" (R. 137) and because "The vice of the employees' conduct in the *Jefferson Standard* * * * case was that it involved a direct attack upon the employer and its business, unrelated to terms or conditions of employment or to any matter in issue between the union and the employer" (R. 138). Assuming the facts in the instant case and the *Jefferson Standard* case were to support such a distinction (we contend they do not), the importance of such a distinction is not apparent. The distinction attempted by the majority amounts to saying that employees can engage with impunity in any type of concerted activities (although the primary intended result of the means used is to damage the employer and at the same time stay on the payroll) so long as the activities "relate to terms or conditions of employment or to any matter in issue between the union and the employer" (R. 138).

Given a situation where employees embark on concerted activities the primary intended result of which is to injure the employer seriously *and at the same time stay on the payroll*—why should their conduct be any more "protected" in the case of publicly condemning the employer's product as in *Jefferson Standard,* than in a case where the union is endeavoring irreparably to cripple the employer by bringing about a mass exodus of its employees? If the reasoning of the majority of the Board in this respect is followed to its logical conclusion, such unprotected activities as refusals to work overtime, intermittent strikes, and the like would all achieve the protection of Section 7 because it could be shown in almost every instance that they were "related

to terms or conditions of employment or to [some] matter in issue between the union and the employer." Both the activities involved in the instant case and in the *Jefferson Standard* case can be regarded as "related to terms or conditions of employment" in that they grew out of bargaining disputes. But to say one activity is protected by Section 7 and the other is not, simply on the basis that the MAC letter of invitation did not talk about the employer's product and the handbills in the *Jefferson Standard* case did, is to apply a superficial, unsound and entirely unwarranted test of statutory scope. The vice of the activities in both cases is that in each instance the primary intended result of the means used was to effect severe damage on the employer and at the same time permit and insure to the employees involved the continuance of their compensation and the retention by them of complete job security. Actually, the MAC type of action amounts to a rejection of the bargaining principle (discussed hereinafter) and might therefore be said to represent even a more drastic departure from the objectives of the Act than do the activities involved in *Jefferson Standard.*

* * *

The Company predicates its argument in respect of the scope of Section 7 on the proposition that the "protected" nature of concerted activities cannot be tested solely on the basis of the legality or propriety of the ultimate long range objectives of such activities (*i.e.,* better wages, better working conditions), but must be tested in addition on the basis of the propriety of the *primary intended result of the means used* in connection with such activities, and also on the basis of whether such

means and such intended result are consistent with the obligations, including the duty to bargain in good faith, imposed upon labor organizations by the Act.

Let us examine the primary intended result of the means used in the instant case. As noted previously, the MAC was characterized in Union circles as a "*punitive* action to *reduce the engineering services available to Boeing*" (R. 33, 478); as a "*punitive* action *to discourage new hires from coming to Boeing*" (R. 33-4, 478-9) as a means "to *encourage* engineers to seek more suitable employment elsewhere" (R. 368). It was devised as a substitute for a strike (R. 343); it was referred to by the head of the Union as a "pressure action" (R. 261); it was developed as a companion idea along with such associated proposals as mass refusals to punch timeclocks, mass refusals to work overtime, "arrangement" of simultaneous medical or dental appointments to bring about sporadic mass absences, intermittent work stoppages, union meetings during work hours, and action calculated to neutralize the Company's recruitment campaign in various colleges and universities by discouraging potential new hires from coming to Boeing for employment (R. 100, 240, 245-6, 334-9, 345-6, 370). The Union was well aware of the potential damage inherent in the means involved in connection with the MAC, and anticipated the terminations of engineers in sufficient quantities so that the Company could not operate, or at least operate only under great difficulty (R. 357). The Union had advance notice from the Company of the potential damage involved and of the Company's attitude toward such course of action (R. 418-9). It was an inherent part

of the Union's scheme to activate the course of action at a time when engineers were in short supply (R. 360).

As to the magnitude of the potential damage to the Company involved in activation of the MAC, reference is made to the testimony appearing on pages 423-427 of the Record, summarized by the Trial Examiner as follows:

> "Vice President Logan testified without contradiction, and I find, that the Respondent's backlog of business at its Seattle Division currently stands at almost an even billion dollars. It involves orders, primarily placed by the United States Air Force, for items vital to our national defense: heavy bombers, guided missiles, gas turbines, and various classified research and experimental projects. All of the Respondent's projects appear to be technical—some highly so—and impossible of completion in the absence of an adequate engineering staff. Logan estimated that if a substantial number of the firm's engineers had resigned at the same time, or within a short period, the Respondent would have had to suspend one project after another as long as the exodus continued; he expressed the opinion—without contradiction—that the firm would have lost 'millions of dollars' worth of business through the forced abandonment of current projects or their cancellation by the Air Force, and that it might have taken the Respondent several years to recover from such a blow, at a cost to it of unnumbered millions of dollars. The Vice President's estimates and opinion have not been challenged as unreasonable." (R. 103-4).

> "In the usual situation, the impact of a strike upon an employer's operations is both immediate and total—or, at the very least, significant. Em-

ployee attrition as the result of a Manpower Availability Conference might not have had the drastic effects characteristic of a strike situation at the outset—but there can be no doubt of the possibility that it might have reached such proportions as substantially to affect the Respondent's operations. And there can be no doubt, either, that its harmful results would have persisted far beyond those properly to be anticipated from a strike of reasonable duration. If successful, in short, the MAC could have contributed substantially to a significant impairment of the Respondent's ability to operate—which, in the case of engineers, could have lasted, conceivably, for a notably lengthy period of time. (There is testimony in the record—which has not been disputed—as to the informed opinion of the Respondent's officials that the successful completion of the MAC could have forced the Respondent to shut down several of its current projects; that its contracts with the Air Force might have been cancelled as a result, with immensely significant financial repercussions; and that the replacement of any experienced engineers who resigned, in the light of the current engineer shortage, would have taken as much as several years. The record shows that the fears of the Respondent in this respect were not articulated to impress the Board; they were communicated to the Union in connection with the Respondent's attempt to justify its course of conduct with respect to Pearson's termination. I so find. And the record, insofar as I can determine, contains no evidence whatever to warrant an inference that the Respondent's fears were illogical or ill-founded.)" (R. 97-8).

Even a *strike* has been held to be unprotected where

it resulted in serious and inordinate financial loss, see *N.L.R.B. v. Marshall Car Wheel & Foundry Co.*, ... F.2d ....., 35 LRRM 2320 (CA-5, 1955). There the striking employees intentionally chose a time for their walkout so as to create a risk of substantial property damage and pecuniary loss to the employer. In spite of the fact that the damage did not actually result because the employer was able to alleviate the situation, the court held the activity unprotected under the Act. The court stated:

> "We think the majority of the Board had no authority to compel reinstatement of those employees who either participated in, authorized or ratified the illegal walkout of October 16, 1951. That the union deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss to respondent cannot be denied. Even conceding the validity of the general principle relied upon, i.e., that employees who engage in certain unprotected activities do not automatically lose their employee status for remedial purposes under the Act, it seems to us that the illegitimate nature of this activity, though taking the form of a concerted walkout rather than a sitdown strike, renders it closely akin to that type of irresponsible and unprotected activity condemned by the Supreme Court as effectively removing the guilty employees from statutory protection."

We re-emphasize the basic proposition that a concerted activity should not and cannot be deemed protected by Section 7 of the Act where the primary intended result of the means used is to effect severe damage on the employer and at the same time permit

and insure to the employees involved, including employed union leaders sponsoring the action, the continuance of their compensation and the retention by them of complete job security. The potential damage in the instant case was severe and irreparable. Such damage was designed to be inflicted on the employer here in such a way as to preclude the employer from doing anything but continuing to pay, employ and thus finance those precipitating, facilitating and encouraging such damage. Such damage was the intended result of the activities in which Pearson was engaged and such activities must be regarded as inherently "improper," "disloyal," "indefensible," irreconcilable with the basic purposes of the Act, and plainly beyond the scope of Section 7.

2. Pearson's discharge was proper because the activities for which he was discharged amounted to a refusal to bargain in good faith on the part of the Union.

Where such conduct as that identified with the MAC occurs as part of a union's bargaining technique, it constitutes an "illegal" course of conduct upon the part of those involved, in that such conduct fails to meet the bargaining standards of Sections 8(b)(3) and 8(d) of the Act; and one so involved is not clothed with the protection of Section 7.

Sections 8(b)(3) and 3(d) embody the obligations imposed upon labor organizations to bargain in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and a failure of a union to meet such obligation is an unfair

labor practice under the Act. The Trial Examiner refrained from determining whether the MAC and the activities in connection therewith amounted to a failure to bargain in good faith on the part of SPEEA and thus a violation of Section 8(b)(3), stating in effect that the Board should be the first to act on the point involved (R. 77). The majority Board opinion makes no mention of the point (R. 130-145).

It is inconceivable that an activity can be considered as consistent with the type of good faith bargaining that the Act clearly contemplates, or can be regarded otherwise than as irreconcilable with the primary aims of Congress in creating the Act, where the primary intended result is to create, facilitate and encourage an exodus and permanent severance of an employer's employees.

It was the intention of Congress in enacting the 1947 amendments to the Act to enforce the same standards of bargaining as to labor organizations as were previously applicable only to employers. In *Chicago Typographical Union, et al. (Chicago Newspaper Publishers' Association)* 86 NLRB No. 116, 25 LRRM 1010 (1949) the Board stated that the statute as amended imposes upon labor organizations a duty to bargain "coextensive" with the duty imposed upon employers. As mentioned in the Recommended Order (R. 73) the Board declared therein "that the provisions of Section 8(d) defining the standard of good faith bargaining restate, in statutory form, the principles established under Section 8(5) [of the original statute, relating to employers]." And in *Textile Workers, CIO (Per-*

sonal Products Corp.), supra, the Board found the union to be in violation of Section 8(b)(3) where it had engaged in a series of unprotected harassing tactics during negotiations, which included organized refusal to work overtime, unauthorized extension of rest periods from 10 to 15 minutes, direction of employees to refuse to work special hours, slowdowns, unannounced walkouts and inducement of employees of a subcontractor not to work for the employer. Such tactics were regarded as "an abuse of the union's bargaining powers—'irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest' * * * ." And see remarks of this Court as to the equal application of the Act to employers and labor organizations in *Davis Furniture Co. v. N.L.R.B.,* ..... F.2d ....., 32 LRRM 2305 (CA-9, 1953).

If such duty to bargain in good faith is coextensive as to employers and unions alike, consider then the converse of the situation under discussion where an employer, during a period of acute unemployment and while bargaining with a union, publishes plans to move the work in his plant elsewhere, progressively, until such time as the union capitulates to his bargaining position, and then takes the initial steps necessary to such movement and does everything further that he can possibly do to carry out such a program. Could there be any serious doubt but that his actions would be regarded as being in violation of Section 8(a)(5) requiring employers to bargain in accordance with the standards set by the Act? See *Precision Fabricators, Inc. v.*

N.L.R.B., 204 F.2d 567, 32 LRRM 2268 (CA-2, 1953); *Diaper Jean Mfg. Co.,* 109 NLRB No. 152, 34 LRRM 1504 (1954). The MAC amounts to parallel conduct on the part of a union and should likewise be held to be a refusal to bargain in good faith.

Again, on the matter of bargaining in good faith, and in respect of the attempt of the Board majority to clothe the MAC with the Act's protection by drawing an analogy between it and a strike, it is to be pointed out that a strike cannot be regarded as a rejection of the bargaining principle and the MAC, after it had passed the "threat" stage and had been activated, must be regarded as a flagrant rejection of the principle. A *strike,* in contradistinction to the MAC type of activity, is in no way related to *an abandonment of employment* or to *an abandonment of the employer,* nor does it even constitute a threat to abandon such employment. Employees on strike, in effect, say to an employer: "We are not leaving you or abandoning you; but we are going to absent ourselves from our work, suffer loss of pay and risk replacement, until our absence hurts you badly enough to force you to come to terms. In the meantime you cannot discharge us. When you do come to terms, we shall be here and ready to go back to work. *Our efforts are directed toward continuing to work for you and not for someone else;* they are also directed toward working out a contract more to our liking *with you.*"

Further, it is difficult to understand how a labor organization can be regarded as conducting the good faith bargaining required by the Act, on behalf of *all*

of the employees in the collective bargaining unit represented by it, where such organization in connection with its bargaining activities sponsors a movement designed to eliminate permanently from the unit a substantial number of those it represents. We do not think that facilitating and encouraging the exodus of some of the employees represented, for the possible benefit of those remaining, is consistent with the statutory duty of an agent certified to represent *all* employees in a unit *in dealings with a particular employer.* And the facilitation and encouragement of permanent group movements of employees from one employer to another is in itself repugnant to the stability in labor relations that is a primary objective of the Act. Quoting from *N.L.R.B. v. Brooks,* 204 F.2d 899, 907, 32 LRRM 2118 (CA-9, 1953): "A primary objective of the Wagner Act, and to an even greater extent the Taft-Hartley Act, was stability in industrial relationships."

Even the majority Board opinion includes "engaging in conduct which cast[s] doubt on the Union's good faith at the bargaining table" (R. 137) as one of the types of conduct conceded to be unprotected. Certainly an individual such as Pearson who was the one primarily in charge of sponsoring, developing and activating the MAC course of conduct, was so engaged.

3. Pearson was properly discharged for "cause" under Section 10(c) of the Act.

The right of an employer to terminate an employee for any cause or no cause, absent any statutory or contractual prohibition, is clear. The following language from *United Electrical Radio and Machine Workers of*

America, et al. v. General Electric Co., ... F.Supp. ....., 35 LRRM 2285 (D.D.C. 1954), is typical:

> "An employer's right to employ and discharge whom he pleases, in the absence of any statutory or contractual provision is unquestioned. As the Court of Appeals, 10th Circuit, said in Odell v. Humble Oil and Refining Co., 201 F.2d 123, 128, Cert. denied 345 U.S. 941, 942, 97 L.Ed. 1367.
>
> " 'It is the universally recognized rule that in the absence of a contract or statutory provisions an employer may discharge an employee without cause or reason or for any cause or reason. (citing cases) * * * .' "

The Act upon which these proceedings are based specifically preserves the right to discharge for cause. Quoting from the same decision:

> "In the Labor-Management Relations Act of 1947, 29 U.S.C. 141, et seq., the right of the meployer to discharge for cause was specifically preserved by a provision in Section 10(c), 29 U.S.C. 160(c) to the effect that
>
> " ' * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged *for cause.* * * * ' "
> (emphasis added).

The majority Board opinion contains no mention of this section of the Act.

If Pearson had acted alone and on his own in inducing and encouraging employees to leave the Company's employ, in soliciting 2,800 firms to hire the Company's employees, in representing himself as a "Licensed and

Bonded Employment Agent" (R. 489) to carry out such objective, and in setting up and carrying forward the elaborate preparations to bring this about that were part of the MAC plan, surely there could be no serious question as to an adequate basis for discharging him for "cause."

In *N.L.R.B. v. Metal Mouldings Corp.,* 12 LRRM 723 (CA-6, 1943), an employee was discharged for recruiting employees for another employer. Although the decision is not entirely clear on the point, it indicates that the court regarded the recruitment of employees for a competing employer as a justifiable cause for discharge.

If a discharge is properly one for "cause" it does not become any less so simply because more employees than one are engaged in the activities that occasioned the discharge. The Supreme Court stated in *International Union, et al. v. Wisconsin Employment Relations Board et al.,* (Briggs & Stratton), *supra,* 336 U.S. at 258: "But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." And more recently in *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), supra,* the Supreme Court stated at 473-4:

> "Congress, while safeguarding, in §7, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' did not weaken the underlying contractual bonds and loyalties of employer and employee. The conference report that led to the enactment of the law said:
>
> " '[T]he courts have firmly established the rule that under the existing provisions of section 7 of

the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct * * * .

" ' * * * *

" ' * * * Furthermore, in section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, *and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.' HR Rep No. 510, 80th Cong, 1st Sess 38-39.*" (emphasis added.)

CONCLUSION

In conclusion, we urge adoption of the views expressed in the dissenting Board opinion as reflecting, when compared with those of the majority opinion, a far more searching and realistic characterization of the activities involved in this case, and as properly articulating the basic objectives of the Act as applied to such activities:

"The Trial Examiner concluded—and the majority does not dispute this conclusion—that the Union's activity, in seeking to facilitate the resignations of a substantial number of the Respondent's engineers, could have caused substantial damage to the Respondent's business. Moreover, contrary to the assertion of the majority, such damage cannot be equated with the losses potentially inherent in a strike; for the damage caused by the Union's activities would have resulted from a permanent severance of the employer-employee rela-

tionship and not, as in a strike, from the mere temporary cessation of work. Pearson sought both to participate in the Union's activity and to continue to draw his pay from the Respondent. The Respondent discharged him because it did not believe it was required to finance such an injury to itself by continuing on its payroll an employee engaged in activities designed to induce other employees to sever their employment relationship. The Respondent's belief, in our opinion, was correct, and its action was wholly within its rights.

" * * * We are not here concerned with the legitimacy of the Union's objectives, but rather with the illegitimacy of the means by which the Union sought to achieve those objectives. The Manpower Availability Conference was not a gathering together in concert of employees in order to compel the grant of a bargaining demand by a temporary refusal to work; it was, rather, an employment agency operated under the aegis of the Union for the purpose of causing the permanent severance of the employment relationship. Such activity is the antithesis of the purposes of the Act, which seeks to strengthen the bonds of cooperation between employer and employee. It is equally as disloyal, equally as injurious to the employer's business, and equally as disruptive of industrial peace and stability, as the conduct which was condemned in the above-cited cases [*N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.)* and *Hoover Co. v. N.L.R.B., supra*]. Because it was conceived and utilized for purposes opposed to the purposes of the Act, the activities of the Manpower Availability Conference derive no protection from the guarantee of Section 7 of the Act.

The Respondent's discharge of Pearson, because of his participation in such an unprotected activity, was accordingly not unlawful, and we would therefore dismiss the complaint in its entirety." (R. 145-8).

Respectfully submitted,

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No. 14540

In the United States Court of Appeals for the Ninth Circuit

BOEING AIRPLANE COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Boeing Airplane Company to review and set aside a portion of an order of the National Labor Relations Board (R. 143–145, 148–150) [1] issued against petitioner on September 30, 1954, following the usual proceedings under Section 10 (c) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*).[2] In its answer (R. 162–164) the Board has requested enforcement of its order. This Court

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[2] The pertinent statutory provisions are reprinted as an Appendix at pp. 22–25, *infra*.

has jurisdiction under Section 10 (e) and (f) of the Act, the unfair labor practice having occurred at Seattle, Washington, within this judicial circuit.[3] The Board's decision and order are reported at 110 N. L. R. B. No. 22.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Briefly, the Board found that the Company violated Section 8 (a) (1) and (3) of the Act by discharging employee Charles Robert Pearson because of his efforts on behalf of the Seattle Professional Engineering Employees Association, herein called the Union, in organizing the Manpower Availability Conference, whose nature is explained in detail on pp. 3–5, *infra*. The facts, which are virtually undisputed but are not fully stated in the Company's brief, are summarized below.

A. The Company and the Union bargain to an impasse concerning wages

Since 1946, the Union has represented a unit of employees in the Company's Engineering Division under a series of collective bargaining agreements (R. 27; 386–387). Beginning in April 1952, the Company and the Union participated in a number of bargaining meetings in an effort to agree upon a contract to replace the one which was about to expire (R. 27–30, 131; 268–269, 287–294). The negotiations con-

[3] Petitioner, Boeing Airplane Company, is a Delaware corporation which manufactures aircraft and aircraft parts. Its operations in the State of Washington involve substantial shipments to and from points outside Washington. No jurisdictional issue is presented (R. 26; 7, 14).

tinued after the expiration of this contract, about August 21, but the parties were unable to reach a new agreement (R. 29–30, 131; 293, 387–388, 393, 526–527). A major subject of controversy was wage rates; the Union finally took the position that the employees should receive a 13.5 percent increase, while the Company offered only a 6 percent increase (R. 28–29, 131; 288–289, 311–312, 314–316, 393, 524).

B. The Union attempts to organize a Manpower Availability Conference

1. The nature and purposes of the Manpower Availability Conference

The Union believed that its position in bargaining with the Company was appreciably weakened by a "Gentlemen's Agreement" between the Company and other aircraft manufacturers that none of them would hire any engineer employed by any of the others without the consent of his present employer (R. 132; 303, 307, 355–356, 359, 366–368, 433–435, 503–511). The Union had been unable to induce the Company to abandon this "Gentlemen's Agreement" (R. 308–309). When the Union found itself unable to obtain a satisfactory wage increase through the negotiating process, the Union's Action Committee, whose function was to consider plans to strengthen the Union's bargaining position, made a report to a union membership meeting suggesting that the Union organize a "Manpower Availability Conference" (herein called the MAC or the Conference) whose nature is described below (R. 31–32; 258–259, 368–369).[4] The members

[4] The Company contends that several other types of pressure suggested by the Action Committee, if adopted, would have constituted unprotected activity. This contention is obviously immaterial, since these recommendations were never approved either

attending the meeting approved the suggestion and instructed the Executive Committee to distribute copies of the report to the membership (R. 31–32; 259–263). The Executive Committee mailed a copy of the report to each member of the Union, together with a questionnaire as to his views on the proposal (R. 31–32; 209, 262, 477–482). About 40 percent of the membership filled out the questionnaire, and about 97 percent of them either favored the proposal or expressed no objection thereto (R. 35–36; 209–212). The scheme suggested in the report may be summarized as follows:

The MAC was conceived as a "market place" where engineers presently employed by the Company could meet with other employers and possibly obtain offers of more desirable employment (R. 32, 132; 209, 477). By using personal data submitted to the Union by participants in the MAC, the Union was to obtain the names of other employers interested in hiring engineers presently employed by the Company (R. 33; 209, 478). The Union was to arrange for a series of conferences at which employee participants in the MAC might meet with the prospective employers located by the Union (*id.*). The employees interviewed were to inform the Union of any differential between their present salaries and those offered by prospective employers (*id.*).

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by the Executive Committee, which is responsible for effectuating union policy (R. 256), or by the Union itself (R. 334–335, 346, 261–262, see 477–482), and none of the allegedly unlawful suggestions was ever put into effect (R. 370–372). The Action Committee was a planning committee only (R. 331).

The Union hoped that this plan, if successful, would (1) put pressure on the Company to offer additional salary increases in the belief that, if it did not, many of its present engineers would quit; (2) help the Union to discover the "true market price for Engineers," particularly in view of the effect of the "Gentlemen's Agreement" (see p. 3, *supra*); and (3) help engineers desiring to leave the Company's employ to obtain the best competitive offer (R. 32–33, 132; 209, 265–267, 366, 477–478).

2. Pearson's participation in the MAC

Prior to receiving the returned questionnaires, the Executive Committee appointed a special Manpower Availability Conference Committee (herein called the MAC Committee) to plan and initiate the conference (R. 36; 195). Charles Robert Pearson, an engineering designer employed by the Company, was named as chairman of the MAC Committee (*id.*). On the basis of the response to the questionnaires, the Union informed the Company that more than 500 engineers were willing to attend the Conference, but the Company submitted a final wage offer substantially less than the Union's final demand (R. 288–289, 293–294, 311–312, 314–316, 393, 524). The Executive Committee then instructed Pearson to obtain a local city license to conduct an employment agency (R. 43; 201–202, 369).[5] Pearson obtained this license in January

[5] The MAC Committee felt that such a license was unnecessary, but decided to obtain the license to remove any possible doubt as to the legality of the MAC (R. 43; 200–201). The license was issued in Pearson's name, since the Union, being neither a person, a partnership, nor a corporation, was not qualified under the applicable city ordinance to obtain a license in its own name (R. 202).

1953 (R. 43; 202). At about the same time, the MAC Committee, headed by Pearson, drafted a letter of invitation to the Conference, to be sent to about 2,800 employers of engineers throughout the country, whose names had been compiled and submitted to him by a subcommittee of the MAC Committee (R. 43, 132; 486–489, 197). The Executive Committee approved this letter, and it was sent out under the Union's letterhead and over a facsimile of Pearson's signature (R. 43, 132, 112–115; 218–219, 221, 486–491). A copy of this letter was sent to A. F. Logan, the Company's vice president in charge of industrial relations, with a covering letter signed by the chairman of the Union's Executive Committee (R. 43, 133; 225, 493–494). The letter to the Company asserted that the Union was conducting the conference "to obtain data on the true market value of engineers with various amounts of experience" and "to provide members with improved opportunities to bargain for their services" (R. 43–44, 133; 225, 493). The letter stated, "Our membership has requested [the Union] to restore the freedom and privacy of engineers who seek to improve their situations by changing employers" (R. 44; 225, 493).[6]

3. The discharge of employee Pearson because of his activity in connection with the MAC

Immediately upon reading the material forwarded to him by the Union, Company Vice President Logan

[6] Almost 90 percent of the enginers indicating on their questionnaires that they desired to leave the Company's employ had asserted that they wished not to disclose their intention to the Company (R. 35; 210–212).

recalled Pearson from a tour of duty out of town and summoned him to Logan's office (R. 45; 225). In response to a direct inquiry, Pearson admitted that the facsimile signature on the letter was his own (R. 45; 226, 232, 494). However, he refused to answer Logan's repeated inquiries as to whether he was a "licensed and bonded employment agent" in the absence of "appropriate members" of the Union, on the ground that the matter directly concerned his activities on behalf of the Union (R. 45–47; 232, 410–411, 494–496). Logan concluded the interview by stating (R. 47–48; 232, 497–498):

> We will * * * make the decision that your work as an employee at Boeing would be entirely too greatly impaired by your outside activities as an employment agent, and we are therefore unwilling to permit you to continue such activities and remain in our employ.

Pearson observed in reply (R. 48; 232, 398):

> Whereas the timing of this action is definitely connected with our release of the manpower availability conference invitations in behalf of the [Union], this action can only be interpreted as being a retaliatory action against the [Union] and discrimination against me personally and retaliation against my legitimate union activities.

Pearson later received a termination notice from the Company attributing his discharge to "Refusal to answer questions relative to outside activities as employment agent" (R. 48; 234, 499–500).

During subsequent negotiations between the Company and the Union concerning Pearson's discharge,

the Company by letter informed Pearson that he had been discharged because the Company felt that the MAC would cause a number of engineers to leave the Company's employ and would also lessen the Company's ability to obtain new engineers, "resulting in serious damage to the Company" (R. 50–52; 236, 393, 500–503, 541–544).

Early in February, the Union informed the Company that it was abandoning the MAC owing to insufficient interest on the part of prospective employers (R. 53, 134; 402). By letter dated March 2, pursuant to the Union's request, the Company offered to reinstate Pearson, noting, however, that the MAC had been unsuccessful and its revival was not anticipated (R. 53–54; 322–323, 514). Pearson accepted the offer and has been working for the Company since March 17, 1953 (R. 54; 134; 237).

C. The Board's conclusions

The Board concluded that, as the Company admitted in its answer (R. 15–16), the Company discharged Pearson because of his activities in connection with the MAC (R. 133). The Board, Members Beeson and Rodgers dissenting, found that the MAC constituted a union and concerted activity protected by Section 7 of the Act, and that therefore Pearson's discharge for participating therein violated Section 8 (a) (1) and (3) of the Act (R. 131–140).

II. The Board's Order

The Board's order (R. 143–145, 148–150) requires the Company to cease and desist from discouraging membership in any labor organization by discriminat-

ing against its employees, or from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their organizational rights. Affirmatively, the Company is required to make Pearson whole for any loss of pay he may have suffered by reason of the discrimination against him, and to post appropriate notices.

SUMMARY OF ARGUMENT

The MAC was admittedly union activity or concerted activity within the literal language of Section 7. The issue is whether it was such improper activity as to fall outside the protection of that Section.

When the Company refused to meet the Union's wage demands, the Union in effect said to the employees, "Our efforts to get you a satisfactory wage having failed, we will put those who wish to change jobs in touch with other employers." This in essence was the MAC. It was not misconduct, invasion of property or contract rights, violation of law, or disparagement of the employer's product—all of which may be unprotected concerted activities. It was, on the contrary, an attempt to restore fair competition for labor, and it "harmed" the Company only by exposing it to the hazards which it would encounter if it paid lower wages than other employers of engineers.

Since the MAC existed for lawful union purposes and did not invade the Company's rights, it fell within the spirit as well as within the letter of Section 7, and a discharge for MAC activity therefore violated the Act.

ARGUMENT

The Board properly concluded that the activity for which the Company discharged Pearson was protected by the Act

A. Introduction—the issue defined

Since petitioner concedes that it discharged Pearson because of his activity in the MAC, this case presents a single narrow issue: was the MAC a union or concerted activity protected by Section 7 of the Act.[7] Moreover, since the MAC was concededly a union activity undertaken by the employees acting in concert, Pearson's activity manifestly fell within the literal language of Section 7. We agree with petitioner, however, that not all "concerted" or "union" activity is protected by Section 7. The issue in this case, therefore, reduces to this question: did the Board correctly conclude that the conduct in this case was not so improper as to forfeit the protection which Section 7 presumptively affords to concerted activity? We shall show that the MAC fell within the spirit as well as within the letter of Section 7, and that it did not contain the elements which have led the courts to deny protection to certain concerted activities.

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[7] The subsidiary issues raised in the Company's brief as to "refusal to bargain" (Br., pp. 40–44) and discharge for "cause" (Br., pp. 44–47) are not, on proper analysis, separate from the main question. If, as we contend, Pearson's activity was protected by Section 7, it did not constitute an unlawful refusal to bargain and his discharge for engaging therein was not for "cause." If, on the other hand, Pearson's activity was not so protected, it is unnecessary to decide whether it involved his union in a violation of Section 8 (b) (3), for it is well settled that an employer may discharge an employee for any reason other than for engaging in an activity protected by the Act.

B. The MAC did not fall within the class of "improper" concerted activities which have no statutory protection

The Company, conceding as it must that the MAC was a concerted or union activity, contends that the activity was "unlawful," "illegal," "improper," "indefensible," and "disloyal" within the meaning of the decisions holding that such activity forfeits the protection otherwise extended by the statute. The Company urges that those are "broad terms," that "the decisions have suggested no particular limitation to their scope" and that "each of these terms applies" to the MAC (Brief, p. 26). Before discussing the cases on which the Company relies, it would seem appropriate to restate just what this "illegal, disloyal, indefensible, etc." conduct was:

The Union had vainly sought a satisfactory wage increase. Confronted with the Company's firm refusal, the Union in effect said to the employees, "We cannot obtain a satisfactory wage increase. We suggest that those who care to do so try to obtain better jobs elsewhere. We know you are hampered by the 'Gentlemen's Agreement,' but we will help put you in touch with other employers." This is the conduct which petitioner characterizes as "illegal, disloyal, unlawful, improper, and indefensible."

The cases cited by petitioner at page 25 of its brief represent a fair sampling of the type of concerted activity from which the courts and the Board have withheld statutory protection. The leading decision is the *Fansteel* case [8] where an unlawful violent sit-down strike was held outside the protection of the

[8] *N. L. R. B.* v. *Fansteel Metallurgical Co.*, 306 U. S. 240.

Act. Similar rulings have been repeatedly made where employees engaged in violence, committed actionable wrongs such as breach of contract, or otherwise invaded property rights or personal rights. Manifestly this line of decisions has no bearing on the peaceful, lawful action involved in this case.[9] Petitioner places particular reliance, however, on five cases[10] in which the concerted activity held unprotected did not involve an actionable wrong, and to those cases we now turn.[11]

The inapplicability of the *Conn* and *Ward* cases appears from the very excerpts quoted by the Company. In *Conn* the employees in defiance of instructions refused to work certain overtime hours, and in *Ward* they refused to work on certain materials. In

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[9] Even treating the MAC as an attempt to induce the employees to quit, this is not a tort since the employees' contracts of employment were terminable at will. *Porter* v. *King County Medical Society*, 58 P. 2d 367, 370, 186 Wash. 410. Furthermore, the conduct was legally justified since it was motivated by a desire to improve wages. *Imperial Ice Co.* v. *Rossier*, 112 P. 2d 631, 632–633, 18 Cal. 2d 814.

[10] *N. L. R. B.* v. *Local Union No. 1229*, 346 U. S. 464 (referred to by the Company and hereinafter as the "*Jefferson Standard*" case);

International Union UAW v. *Wisconsin Employment Rel. Bd.*, 336 U. S. 245 (hereinafter "*Wisconsin*" case);

N. L. R. B. v. *Montgomery Ward & Co.*, 157 F. 2d 486 (C. A. 8) (hereinafter "*Ward*" case);

C. G. Conn, Ltd. v. *N. L. R. B.*, 108 F. 2d 390 (C. A. 7) (hereinafter "*Conn*" case);

Hoover Co. v. *N. L. R. B.*, 191 F. 2d 380 (C. A. 6) (hereinafter "*Hoover*" case).

[11] This is not to say that "every law violation * * * by striking employees brings their status within * * * *Fansteel* * * *." *N. L. R. B.* v. *Cambria Clay Products Co.*, 215 F. 2d 48, 54 (C. A. 6).

both cases the refusal of the employees to do the directed work was analogous to a sitdown or slowdown, crippling the employer's production. In the instant case there is no suggestion that the employees failed to perform any task petitioner assigned them, or that the MAC adversely affected production.

The *Wisconsin* case is quoted at petitioner's brief, pp. 27–28, for the freely conceded proposition that "illegal action is [not] made legal by concert." In that case the employees engaged in 26 "surprise" walkouts, for no stated demands, within five months. The Supreme Court, noting that the employer had not discharged the employees for this conduct, sustained the view of the state labor board that this activity was "similar to the sit-down strike * * * and to * * * labor violence." See *U. A. W.* v. *O'Brien,* 339 U. S. 454, 459, explaining the *Wisconsin* decision.

Both the *Hoover* and the *Jefferson Standard* cases involved action by the employees designed to destroy their employer's market. In *Jefferson Standard* the employees circulated handbills attacking the quality of their employer's services, and in *Hoover* the employees requested potential customers to boycott the employer's product.[12] Thus in *Hoover,* the Sixth Circuit recognized that "of course, an employee can engage in 'concerted action for mutual aid and protection' even though it may be highly prejudicial to

[12] The actual holding in *Hoover* was that the boycott was incidental to a strike which was inherently unlawful. See the discussion of the case in *N. L. R. B.* v. *Electronics Equipment Co.*, 194 F. 2d 650 (C. A. 2).

his employer, and results in his customers' refusal to deal with him, just *so long as such activity is not a wrong done to the company.*" (191 F. 2d at 390). [Emphasis supplied.] But, the court added (*ibid.*):

> It is a wrong done to the company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required, under the Act, to finance a boycott against himself.

Similarly in *Jefferson Standard* the "disloyalty" condemned by the Supreme Court was a public disparagement of the commodity the employer sold. Moreover, in the latter case the Supreme Court emphasized that the antiemployer literature was totally unrelated to the labor dispute.

Manifestly the conduct of the employees in the instant case is a far cry from the boycotting and disparagement of product involved in the cases relied on. Here the employees were exercising nothing more than their right to obtain better employment, either from Boeing or from other employers. Cf. *Pollock* v. *Williams,* 322 U. S. 4, 18, where the Supreme Court observed that "the defense against oppressive hours, pay, working conditions or treatment is the right to change employers." If any harm was visited on the employer here, it was not because the employees attacked his product or interfered with his selling; *it was solely because he was not meeting the competition of other employers in the labor market.*

Petitioner purports to find in the cases it relies on an underlying principle that employees cannot engage in concerted activity potentially harmful to the employer's economic interests while continuing to draw pay from him. We submit that analysis of the decisions reveals the falsity of this proposed touchstone. In the first place, the entire line of decisions stems from the *Fansteel* case, where the employees had in fact gone on strike, but were nonetheless held outside the protection of the Act because of their invasion of the employer's property rights. The fundamental test in the "misconduct" cases is not whether the employees are continuing to draw pay but whether their misconduct is of a violent or otherwise serious character. Conversely, the attack on the employer's product in *Jefferson Standard* would have been grounds for discharge even had the employees who participated in the attack been on strike at the time. Moreover, petitioner's "touchstone" proves too much, for concerted activity is normally protected by the statute whether or not the employees engaging therein have gone on strike. Perhaps the most typical example is prestrike activity itself. Obviously the statutory protection extends to employees who, while still drawing pay, urge that they and their fellow employees should go on strike. Similarly, organization of a union raises a threat of potential harm to the employer's economic interest, but an employer could not lawfully discharge an employee for lawful organizing activity merely because the employee did not go on strike while conduct-

ing his campaign.[13] In short, the "touchstone" for determining whether concerted activity is outside the protection of the Act is to be found not in whether the persons engaged therein are drawing wages from the employer nor in whether the activity may result in economic harm to the employer, but in whether the activity results in an invasion of the employer's rights in a manner unrelated to the legitimate objectives of employee concerted activity—e. g., violent conduct, destruction of property, refusal to perform assigned tasks, disparagement of employer's product.[14] As Judge Learned Hand stated for the Second Circuit in *N. L. R. B.* v. *Peter Cailler Kohler Co.,* 130 F. 2d 503, 506,[15]

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[13] Cf. *N. L. R. B.* v. *Southern Pine Electric Coop.*, 35 L. R. R. M. 2531 (C. A. 5, February 4, 1955), enforcing 104 N. L. R. B. 834, 840–842, where the court recognized that the protection of Section 7 extended to employees who threatened to quit unless their employer met their wage demands.

[14] Cf. *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798, recognizing that the rights protected by Section 7

> "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

Congress entrusted to the Board "the function * * * to weigh the conflicts which arise from time to time out of the exercise of those rights and to determine in each case whether the interest of the employees or the employers should be held paramount." *N. L. R. B.* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. A. 7).

[15] Contrary to the suggestion in the Company's brief (p. 31), the *Peter Cailler Kohler* doctrine was unaffected by the 1947 amendments, and the case was cited with approval as recently as *N. L. R. B.* v. *Local Union No. 1229*, 346 U. S. 464, 475, and *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 40n, as well as in the *Hoover* case, 191 F. 2d at 390.

> [many] union activities may be highly prejudicial to its employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs, and has *pro tanto* shorn him of his powers.

In the instant case the record leaves no room for doubt that the MAC was created to serve a legitimate union purpose (cf. n. 9, p. 12, *supra*). Basically the MAC was conceived by the Union as a means of furthering its lawful demands, made in the course of collective bargaining, that the Company grant a wage increase. It is, of course, elementary economics that wage rates (i. e., the "price" of labor) are in large part controlled, like other prices, by the laws of supply and demand. In the instant case the Company had the advantage of the "Gentlemen's Agreement," which operated to curtail the normal mobility of the labor market and accordingly strengthened the Company in its bargaining position. The Union sought to offset this factor by increasing the number of job opportunities through the MAC. Had the MAC succeeded, the increased demand for and decreased supply of labor would have bolstered the Union's wage demands.

A second, closely related purpose of the MAC was to help the Union discover the "true market price for engineers" (*supra,* p. 5). Manifestly if other employers of engineers were paying higher wages than the Company, this fact and the precise level of those

wages would be of substantial value to the Union in its bargaining with the Company.

A third purpose of the MAC was to serve engineers who desired to leave the Company's employ by making it easier for them to get other employment. This, of course, is a most elementary form of concerted activity for mutual aid, and is the direct counterpart of the employers' "Gentlemen's Agreement." The Company argues that the Union's purpose was to make the employees dissatisfied with their jobs.[16] This contention overlooks the basic fact that, quite apart from the MAC, the normal monthly turnover in the industry was close to 3 percent, so that the Union was necessarily and properly concerned with finding jobs for those of its members who desired to move.[17] The MAC actually did not aggravate this problem, for the record shows that only 96 engineers expressed a desire to leave the Company's employ, exactly 2.7 percent of the Company's 3,500 engineers (R. 210–211, 388).

Moreover, many unions regularly operate as a sort of "employment agency," referring their members to employers who indicate a need for labor. This Court is familiar with the hiring hall practices in the build-

[16] The Company's statement that Pearson "was making every possible effort * * * to retain *his* job" (Br., p. 33) fails to take into consideration the fact that Pearson's efforts to obtain a better job were frustrated by the "Gentlemen's Agreement." See R. 508.

[17] During the calendar year 1953, the average "quit rate" of employees in the aircraft industry was 2.7 per 100 employees per month. Bureau of Labor Statistics, United States Department of Labor, Monthly Labor Review, July 1952 to April 1953, inclusive, Table B–2 in the appendices to each issue.

ing construction and stevedoring industries.[18] In those industries a dissatisfied employee may quit his job with the knowledge that his union will refer him to another employer. Accordingly, insofar as the MAC sought to make other job opportunities available to dissatisfied employees, it was engaging in legitimate union activity.

The Company stresses the fact that the Union itself stated as a final reason for sponsoring MAC "punitive action to reduce the Engineering services available to Boeing" (R. 478). In the context of this case the term "punitive action" meant nothing more than the infliction of economic hardship on Boeing for its failure to meet competitive wage standards. If the employees had struck in support of their wage demands, this too would have been "punitive action" against Boeing; indeed the damage to Boeing would have been far greater than that resulting here. And it is no answer for Boeing to state that it could have replaced strikers, for it was equally free to replace any employee who vacated his Boeing job as a result of MAC. Moreover, the employees felt compelled by the "Gentlemen's Agreement" to restore a free labor market, and the MAC was "punitive" in the sense that it "punished" Boeing for its role in restricting employment opportunities.[19] In essence the MAC was

[18] See, e. g., *N. L. R. B.* v. *Swinerton & Walberg*, 202 F. 2d 511, certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *International Longshoremen's Union*, 210 F. 2d 581.

[19] It is not necessary to find that the "Gentlemen's Agreement" was an unlawful restraint. But cf. the order of the Federal Trade Commission in *Union Circulation Co.*, 23 Law Week 2407, citing *Anderson* v. *Shipowners Assn.*, 272 U. S. 359. It is like-

"punitive" only in the sense that it exposed the Company to competition for the services of its employees, and penalized the Company for failing to meet that competition. This "punitive action," we submit, is an inherent part of a system of private enterprise.

Finally, the Company attacks the MAC as illegal. As we have already observed, the MAC did not constitute a tort under applicable Washington law (p. 12, n. 9, *supra*). Petitioner's contention (Br. p. 36) that other Union proposals, never brought to fruition, were unlawful, sheds no light on the legality of the tactics eventually adopted by the Union. And, contrary to petitioner's suggestion (Br., p. 42), neither an employer nor a union is guilty of a refusal to bargain merely because it invokes its right to lockout or to strike in a good faith attempt to enforce legitimate economic objectives. See *Leonard* v. *N. L. R. B.,* 197 F. 2d 435, 441 (C. A. 9); *Mount Hope Finishing Co.* v. *N. L. R. B.,* 211 F. 2d 365, 371 (C. A. 4); *Brown McLaren Mfg. Co.,* 34 N. L. R. B. 984, 1005–1006.[20]

In short, the MAC existed for the lawful purpose of furthering the economic interests of the employees

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wise irrelevant that the Union may have misconceived the effect of the "Gentlemen's Agreement." Cf. *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 344.

[20] We do not understand petitioner's contention that the Union was acting unlawfully because it was not representing all the employees in the bargaining unit when it fostered the MAC. Participation in MAC was available to all employees, and its purpose was to better the lot of both those employees who desired to change employment and those who desired to remain in Boeing's employ.

in the bargaining unit. It involved no invasion of the employer's property or contract rights, no public disparagement of his product, no unlawful action by the employees. Insofar as it threatened to harm the employer, it did so only as a legitimate economic weapon, exposing him to the competition of other employers who paid better wages. Hence, the employees who, like Pearson, participated in the MAC were engaging in a union or concerted activity within the protection of the Act, and could not lawfully be discharged therefor.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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MARCH 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board.

Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under

subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1955

No. 14540

United States Court of Appeals

For the Ninth Circuit

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vs.

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of
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INDEX

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REPLY BRIEF
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I.
The Record Does Not Support the Statements in the Board's Brief as to the Nature and Character of the Activity that Occasioned Pearson's Discharge.

The Board's brief would have the Court view the program of activity that occasioned Pearson's discharge merely as an innocuous after-the-fact gesture of assistance on the part of the Union to its members, in the direction of finding jobs for them elsewhere after the Union's collective bargaining efforts to obtain a "satisfactory" increase for them had been in vain. The statement is made (Board br. 9):

> "When the Company refused to meet the Union's wage demands, the Union in effect said to the employees, 'Our efforts to get you a satisfactory wage having failed, we will put those who wish to change jobs in touch with other employers.' *This in essence was the MAC.*" (emphasis added)

What in effect actually was said to the employees may be more aptly put as follows:

> "The executive group of the Union has devised an extraordinary new weapon to be used against the Company. This device affords a means of inflicting damage on the Company far more severe and lasting than any damage that could be hoped to result from a strike but while our plan has all of the advantages of a strike, and more, it has none of the disadvantages. Our plan is the Manpower Availability Conference and there is no valid reason why you should not support it and carry it out. Under the plan, your jobs will be absolutely secure as long as you want them, and the Company can do nothing but continue to pay you your full salary irrespective of the number of permanent terminations that may be encouraged and brought about by it, or of the number of potential new hires that may be turned away as a result, or of the ultimate damage that such program may cause. You simply cannot lose and the Company thus will be required to finance the very campaign that is aimed at paralyzing its operations, or forcing its capitulation."

As pointed out in the opening brief, the program was devised by Union executives many months prior to the time that anything approaching a bargaining impasse occurred. It was developed as one of several alternative considered "plans of action" and such alternatives afford a key to the prime objective of the plan finally adopted. As mentioned in the opening brief the alternatives included mass refusals to punch time clocks; mass refusals to work overtime; "arrangement" of simultaneous medical or dental appointments to bring

about sporadic mass absences; intermittent work stoppages; union meetings during working hours; action calculated to "neutralize" the Company's recruitment campaign in various colleges and universities by discouraging potential new hires from coming to Boeing for employment, etc. (R. 100, 240, 245-6, 334-9, 345-6, 370).

Early assertions as to the primary objectives of the MAC, prior to this litigation and the immediately preceding period, merit particular attention. In the description of the plan prepared by the Union committee that conceived it, an objective of the plan was candidly represented to be "to encourage engineers to seek more suitable employment elsewhere" (R. 368). The MAC was described to employees as a "punitive action *to reduce the engineering services available to Boeing*" (R. 33, 478) (emphasis added). It was represented to employees that the publicity attendant upon the MAC would have a "punitive" action to *discourage new hires from coming to Boeing* (R.32-3, 477-8) (emphasis added). It is to be noted also that, throughout, the Union was well aware of the fact that engineers were in critically short supply (R. 360) and of the potential damage to the Company inherent in activating the plan (R. 419-20). Compare the Board's characterization of the plan (Board br. 9) with the following testimony of the Union's chief executive at the time:

> "Question. These actions, including the Manpower Availability Conference, and the refusal to punch time clocks, and these other plans of action

which were set forth in the plan of the Action Committee, were all designed to bring pressure on the company without the necessity for a full strike, isn't that correct?

Answer. Without the necessity for a full strike, you say?

Question. Rather than going out on strike, everybody leaving their jobs?

Answer. I would say these have been considered as an alternative or as an adjunct to the strike." (R. 343-4)

The contention that important objectives of the plan were "to obtain data concerning the 'market value' of engineers" (R. 32, 477) and "to provide a meeting place where prospective employers could be contacted on an exploratory basis" (R. 32, 477) can hardly be regarded seriously. It is part of any Union's obligation as collective bargaining agent to have at all times general knowledge of "going rates" or market value. To obtain such knowledge what more would have been necessary than to direct written or telephoned inquiries on the point to various agencies, firms or employees throughout the country? And at the present time, when collective bargaining negotiations are the rule rather than the exception, "going rates" are matters of common knowledge to employers and unions alike. These and similar stated objectives of the MAC plan were clearly makeweight.

Again, concerning the nature and character of the activities under consideration, the Board's brief repeatedly speaks of "the employees" and attempts to

convey the impression that we are here dealing with a spontaneous concerted movement of the group of employees in the SPEEA unit, acting as a body. Such a characterization was not the case in any sense of the word and is irreconcilable with the concession made on page 18 of the Board's brief that actually only 2.7% of the employees expressed the desire to obtain other employment. Under the Act (Section 9(a)) a certified bargaining agent is authorized as the exclusive representative of all the employees in the appropriate unit *for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.* The statutory scope of such agent's authority to act on behalf of all employees without their specific and individual authorizations is limited to the matters italicized above. It has no statutory authority whatever to induce or encourage employees within the unit to leave their employment and go elsewhere. It has no statutory authority to facilitate such movements or find jobs elsewhere for such employees or put them "in touch" with other employers. To the extent that the MAC plan involved activities of this nature, the individuals engaged therein were not acting on behalf of the group of 3,500 engineers in the unit, and the activities must be viewed as those of individuals rather than those of a certified collective bargaining agent. Thus, in the MAC plan of action we are dealing actually with a small minority group of employees who were attempting to promote, encourage and induce mass terminations among the entire collective bargaining unit. The Court

is not here presented with the situation where a group of employees, spontaneously and on their own, approach the employer with their ultimatum to quit and go elsewhere unless their terms are met, as in *N.L.R.B. v. Southern Pine Electric Coop.*,* cited in the Board's brief on page 16.

II.

The So-called "Gentlemen's Agreement" Relating to Members of the Aircraft Industries Association Has No Bearing on the Issue Before the Court.

In several places (Board br. 3, 11, 17, 18 and 19) the Board's brief attempts to place great emphasis on the so-called Gentlemen's Agreement as justifying the MAC activity and rendering it subject to the protection of Section 7 of the Act. The majority opinion of the Board contains no finding that will support such a contention.

The term "Gentlemen's Agreement" was used in the proceedings in reference to a policy described in a resolution of the Aircraft Industries Association, an association of some eighty firms engaged in the manufacture of aircraft and accessories, of which association the Company is a member (R. 439). It was a policy advocated and in effect compelled by the Air Force (R. 436-8, Res. Ex. 23). The complaint makes no mention of the Gentlemen's Agreement or any contended relation of the MAC thereto (R. 6-14). Evidence was offered by the General Counsel, and admitted over objection, the substance of which was that such policy

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* Complete titles and reporter citations of cases mentioned herein are shown in the table of cases following the index hereto.

condemned the practice of offering employment to employees working for other members without the consent of the latter, and recommended that "pirating" of employees be discouraged (R. 450-1). The Union could not have "misconceived the effect" of it, as suggested in the Board's brief, as the Company advised the Union in writing and in detail as to the Boeing practice in connection with such policy several months prior to activation of the MAC (R. 503, G.C. Ex. 10). While the Board majority (R. 132) stated that they "reject the [Company's] further contention that the impact of that agreement was not properly in issue in this proceeding" on the other hand, they later state (R. 135): "Whether the Gentlemen's Agreement in fact restricted the employment opportunities of the [Company's] engineers *is in our opinion immaterial to the issues of this case.*" (emphasis added)

For this reason, no reference to the matter was made in the opening brief, but in view of the remarks in the Board's brief on the subject, a brief discussion of it follows.

In regard to such policy, it appears to be the nature of the Union's contention that secret dealings, for new employment, between Union members employed by Boeing, on the one hand, and other employers, on the other, are hampered by the policy with the result that efforts to obtain employment elsewhere (without jeopardizing existing employment) are impaired to the detriment of Union members. Neither such contention nor the contentions made in the Board's brief are of any substance, for the following reasons:

(a) The "policy" involves no contractual obligation or understanding, either oral or written (R. 438).

(b) Whatever the practices of other employers, the Record is absolutely clear that Boeing has never at any time refused permission to an employee to go to another employer (R. 442). The members of the AIA are not members of a multiple-employer unit (R. 448). No such unit is involved in this case, and the actions and policies important to the issue in this case can be only those of Boeing and not of some other firm.

(c) It has been the Company's long established practice antedating the AIA resolution, to attempt to afford to the Company an opportunity to interview an employee when an inquiry as to his employment comes from another employer. Where the Company is unsuccessful in persuading such an employee to remain in the Company's employ, no termination occurs and secret negotiations with such other employer are completely available to him. This is the extent of the Company's practice and policy as to its employees, in connection with the so-called 'Gentlemen's Agreement" (R. 442-3).

(d) As indicated above, the Company's practice in connection with the policy mentioned in the AIA resolution imposes no "restriction" of employment. Any contention that the "policy" imposes a restriction, in the sense that it renders it difficult for employees to contact other employers without knowledge of such contacts coming to the attention of their immediate employer, is without merit. The Record clearly shows that Boeing employees are not prejudiced by any such

contended lack of secrecy, as they may continue to work or subsequently carry on secret negotiations if they choose. Further, in the majority of cases, such knowledge would continue to come to the immediate employer in any event as a result of the normal inquiries of other firms concerning the work record, with previous employers, of applicants for employment. Moreover, the MAC can in no sense be regarded as neutralizing any such contended absence of secrecy, when it is considered that representatives of hundreds of firms were to attend and participate in the MAC and that the Union anticipated that there would be considerable attendant publicity. Boeing was furnished with a copy of the "invitation." Knowledge and identity of the employees participating in the MAC would have been easily available to all concerned and was a foregone conclusion. In the Union description of the MAC it was stated (R. 479, G.C. Ex. 2):

> "This conference should be sufficiently unusual to be newsworthy and could thus aspire to considerable free publicity. This publicity in turn would have a further punitive action to discourage new hires from coming to Boeing."

Again (R. 479-80):

> " 'What if the Company finds out about the Conference?' It would be our intention that they find out well in advance, when some invited Companies send them our letter, if they haven't learned of it sooner by word of mouth."

(e) The "market" for the talents and abilities of engineers is not confined to the eighty firms in AIA. The Pearson letter (R. 486, G.C. Ex. 4) was sent to

some 2,800 firms throughout the United States which were regarded by the Union as "prospective employers of engineers" (R. 198).

(f) Boeing is the only aircraft manufacturer in the Pacific Northwest and, unlike the situation in the Los Angeles area, a move by one of Boeing's employees to another aircraft manufacturer involves, in most instances, a change of residence. All the Company's practice amounts to is to attempt where possible to remove a cause of dissatisfaction before an employee determines to take the major step of changing residence. Such a practice cannot help but be ultimately beneficial to the majority of employees.

(g) The policy reflected in the AIA resolution is not *inconsistent* with the spirit and objectives of the Act. Stability of labor relations, rather than a situation of constant migration and instability, is the result sought by the Act.

(h) Finally, the MAC "plan of action," as evolved and promoted by Union officials in the Company's employ can not realistically be regarded as having been aimed at the so-called Gentlemen's Agreement or at achieving some comprehensive and sweeping change in nation-wide or industry-wide employment practices. It was evolved and developed as a weapon aimed at the immediate employer and its obvious objective was to require the Company to finance a program designed to strip it of its engineering force to a point where capitulation to Union demands, or drastic and lasting damage, were the Company's only alternatives.

III.

The Analogies that the Board Attempts to Draw, as Between the Activities Here Involved and Certain Other Types of Activity, are Erroneous.

The Board would put the MAC on the same basis as a strike and "pre-strike activity" (Board br. 15). We know of no decision even suggesting the idea that "pre-strike activity" that is disloyal or causes damage while the employees continue on the payroll, is protected activity. Moreover, a strike and proper activities incidental thereto have specific statutory sanction. The strike, and the lockout, have been described by this Court in a previous case as the "correlative powers to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached" (*Leonard v. NLRB,* 197 F.2d 435 at 441 (CA-9, 1952)). But the fallacy of the analogy attempted in the Board's brief is apparent when consideration is made of the fact that the strike does not amount to a rejection of the bargaining principle; it is not a "disloyal" activity; it does not constitute an abandonment of employment nor does it encourage or facilitate such abandonment; it does not send personnel to the aid of a competitor; it can be terminated at any time by the union with full restoration of the work force and resumption of production; it is not required to be financed by the employer; and it is not designed to bring about substantial numbers of permanent severances. (See opening brief, page 43). In the case of the MAC type of activity, replacement can only occur after the successful conclusion of the activity and the occurrence of irre-

versible damage to the employer. Replacement can occur at any time during the progress of a strike.

Again, it is urged that the MAC type of activity be regarded as parallel to "hiring hall practices," the latter being alluded to as "legitimate union activity." The facts do not permit any such parallel. The typical hiring hall is staffed by union-paid members or individuals, and not by individuals employed by any employer with which the hiring hall deals. The primary objective of a hiring hall is to dispatch *unemployed* union members to employers who have available job openings. Wholly unlike the activities involved in this case, damage to, or pressure on an employer is not one of its objectives. It does not function in a manner to encourage, induce or facilitate working employees to change employment. It is submitted that an employer would be fully within his rights under Section 10(c) of the Act to discharge an employee for "cause" if that individual were found to be employed at a hiring hall and engaged in a program designed to hire personnel away from the employer in order to damage or bring "pressure" on him. Pertinent remarks of the Trial Examiner in regard to the matter of hiring halls appear at pages 88-9 of the Record.

IV.

The Decisions Do Not Support the Conclusions Urged in the Board's Brief.

The *Fansteel* case, one of the early decisions under the Wagner Act, is characterized in the Board's brief as "the leading decision." A sit-down strike accompanied by violence was in that case held to be un-

protected, but the decision has never been authority for the proposition that an activity to be unprotected must be violent or constitute an "actionable wrong." Under the present decisions determination of tort or contract liability clearly is not a required condition to the classification of an activity as unprotected. The very terms used by the courts in referring to activities deemed unprotected ("disloyal," "improper," "indefensible," etc.) demonstrate this.

The *Conn* and *Ward* cases are disposed of by the Board as inapplicable, because the means of attempting to cripple the employer's production involved in those cases were, respectively, refusals to work overtime, and refusals to work on certain materials. Neither these nor any other decisions have ever suggested that unprotected activities are confined to occurrences bearing on or related to work assignments, and the *Hoover* and *Jefferson Standard* cases both dealt with "outside" activities.

The proposition for which the *Wisconsin* case is cited by the Company is conceded by the Board (illegal action is not made legal by concert). And the *Jefferson Standard* decision approves application of this principle to disloyal or improper conduct, and discharges for cause (see opening brief, pages 46-7). The importance of this principle becomes apparent in view of a decision such as that in *NLRB v. Metal Mouldings Corp.* in which an individual who was not acting in concert with others, but who was found to have been recruiting employees for other employers, was deemed to have been properly discharged for cause. The

Board's brief contains no mention of the latter decision, which was cited in the opening brief.

The *Hoover* and the *Jefferson Standard* decisions are sought to be distinguished because the means used by the employees in those cases were "designed to destroy their employer's market" (Board br. 13). In other words, it is all right for an employer summarily to discharge employees who are attempting to cut down his sales, but an employer is compelled by the Act to continue to pay, and to do nothing to interfere with employees who are attempting to hamstring his production and aid his competitors by developing and attempting to activate a full scale program aimed at the encouragement and facilitation of mass transfers of his employees to his competitors and to other firms. Neither the *Hoover* nor the *Jefferson Standard* decisions afford any basis for such a tenuous distinction.

The gist of the *Hoover* decision is found in the following sentence:

> "He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business." (191 F.2d 380, 389).

The phrase "employer's business" is broad enough to include all aspects of the purchasing, manufacturing, shipping and selling processes, and the decision indicates no intention on the part of the Court to confine the meaning of the phrase as the Board suggests.

Similarly there is not a word in the Supreme Court's decision in the *Jefferson Standard* case that would infer that injury to the employer's market establishes

the perimeter of the area in which discharges for disloyalty are proper. The decision indicates that the result might be otherwise if damage were to occur as the consequence of statements made to the public, the primary purpose of which is to enlist public support and sympathy in connection with a labor dispute with a particular employer (as in the case of the conventional picket sign). This indication derives from the following statement in the opinion (346 U.S. 476):

> "Their [the employees'] attack related itself to no labor practice of the Company. It made no reference to wages, hours or working conditions."

This statement obviously was made by the Supreme Court in order to dispose of the possibility that the doctrine of *Thornhill v. Alabama* or *A. F. of L. v. Swing* (right of free speech in publicizing and enlisting public support in a labor dispute) was involved. Such doctrine is in no way involved in the instant case. The MAC was not publicized in any way to third persons as a vehicle or device for recruiting public support on the side of SPEEA in connection with any labor dispute between it and Boeing. (Neither Boeing nor any labor dispute is mentioned in the Pearson letter.)

In various other respects the situation here involved either parallels the *Jefferson Standard* situation, or involves even more flagrant employee activity. In *Jefferson Standard* there was not even the suggestion of abandoning the employer. Mass abandonment was one of the important key-notes of the MAC. The activities in both cases were designed to bring "pressure" upon the employer in connection with union bargaining

demands. The employers in both cases could have avoided being damaged by the activities (as the Board's brief suggests that Boeing could have avoided damage) by acceding to union demands. Neither the handbills in the *Jefferson Standard* case nor the Pearson letter in the present case made reference to the wages, hours or working conditions of the employer. Both activities were designed to permit the employees to continue to remain employed and draw pay as long as they chose, while the damage went on and the "pressure" increased. The potential damage from a successful activity of the type here involved is far greater and probably more lastingly incapacitating than the damage that ensued as the result of the disparaging remarks contained in the handbills mentioned. Certainly the intended result of the handbills in *Jefferson Standard* cannot be regarded as less onerous than the intended result, among others, of the MAC to "neutralize" the Company's recruitment campaign and to discourage new hires from coming to Boeing (R. 32-3, 477-8). Such an intended result could in no sense be regarded as one of the "legitimate objectives of employee concerted activity" (see Board's brief, page 16).

V.

Other Contentions of the Board Are Without Merit

The observation is made on page 14 of the Board's brief that "if any harm was visited on the employer here, it was not because the employees attacked his product or interfered with his selling; it was solely because he was not meeting the competition of other employers in the labor market." If this statement

were sound, few if any activities would be outside the protection of Section 7. Had the union demands been met in the *Jefferson Standard* case, issuance of the handbills would not have occurred; the boycott similarly could have been avoided in the *Hoover* case, and so on. The same observation applies to the activities regarded by the Courts as unprotected in other decisions. Further, there is no basis in fact for the assertion that Boeing was not competitive. Boeing offered a 6% increase months in advance of the time that its competitors placed such an increase in effect (R. 446). Compare the Union's demand for a 13.5% increase (Res. Ex. 5).

* * *

The principle expressed by the Company in the opening brief—that activities are unprotected where their primary intended result is to inflict economic damage upon an employer and at the same time maintain pay continuity and job security for the employees involved—is characterized as a fallacious "touchstone" in the Board's brief at page 15, the contention being that the matter of continuing to draw wages has no bearing on the protected or unprotected nature of the activities. This observation ignores the decisions on the subject. It is recognized that the improper, disloyal and indefensible nature of an activity may turn on the fact that it is directed against an employer from whom those engaged in the activity are continuing to draw pay. This is well recognized in the *Jefferson Standard, Hoover* and other decisions. An individual

continuing to draw pay owes complete loyalty to his employer and their common enterprise.

* * *

It is contended in the Board's brief at page 20 that the concededly "punitive action" of the MAC type of activity "is an inherent part of a system of private enterprise." Under the present status of the law, this cannot be true. Elsewhere the Board's brief refers to the invasion of "personal rights" as constituting unprotected activity. Under the Act, and the stability of labor relations that it attempts to achieve, it would certainly seem that, at the very least, one of such "personal" rights on the part of an employer, particularly one who is paying competitive wages, would be to free himself of an employee who is attempting to disturb and destroy such stability of relationship by conducting a campaign designed to bring about and encourage substantial numbers of personnel terminations.

* * *

Footnote 7 on page 10 of the Board's brief summarily disposes of the Company's contentions: that Pearson's discharge was for "cause" under Section 10(c) of the Act, and that his activities were part of a refusal to bargain as required by the Act—by stating in effect that if the activities were protected by Section 7, both contentions fall automatically. This is merely circuitous reasoning and in no way disposes of the contentions mentioned. One can just as well "dispose" of Section 7 by saying that if the discharge was for cause under Section 10(c), or if the activity in which Pearson was engaged did not meet the Act's require-

ments as to bargaining in good faith, then the activity could not have been a protected activity under Section 7, etc. Section 10(c), dealing with discharges for cause, and Section 8(b), dealing with the duty of unions to bargain in good faith, are as much a part of the Act as Section 7. The Supreme Court in the *Jefferson Standard* case disposed of the issue therein under Section 10(c) and not under Section 7. The footnote appears to contain the only direct comment in the Board's brief as to whether Pearson was discharged for cause and whether the activities in which he was engaged met the Act's standards of bargaining.

* * *

Finally, the test to determine whether an activity is "protected" or "unprotected" that the Board's brief urges upon this Court (Board br. 16) is:

> Does "the activity result[s] in an invasion of the employer's rights in a manner unrelated to the legitimate objectives of employee concerted activity—e.g., violent conduct, destruction of property, refusal to perform assigned tasks, disparagement of employer's product"?

Apparently this test is contended to establish a recognizable, clear-cut line, on one side of which an employer is free to terminate employees for invading his "rights," and on the other side of which such terminations constitute the serious offense of violating a national law. We find the purported test to be meaningless. What is "a manner unrelated to the legitimate objectives of employee concerted activity"? Are not sitdown strikes, slowdowns, wildcat strikes and intermittent strikes all conducted in a manner that is *related*

to the "legitimate objectives" mentioned in the Board's brief? Does not a "manner" of action have an "illegitimate" objective where, as here, the primary objective is to injure the employer, aid his competitors, discourage his potential new hires, and at the same time preserve pay continuity and job security for those so engaged? What possible concerted activity can there be that is not related in some manner to "legitimate objectives" of concerted activity—wages, hours, or working conditions? The patent ambiguity and inaccuracy of this purported test compels its rejection.

We again urge the applicability of the principle that an employee can not be on a strike and at work simultaneously, and that an activity is unprotected, irrespective of the propriety of its ultimate objectives, where the primary intended result of the means used is to effect severe damage on the employer, while at the same time employing a technique that will permit employees so engaged to continue to draw pay and retain complete job security.

Respectfully submitted,

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No. 14540

United States Court of Appeals

For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICUS CURIAE

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INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

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BRIEF OF AMICUS CURIAE
Representing Seattle Professional Engineering Employees Association (SPEEA)

We adopt the statement relating to the jurisdiction of this court, and the Counter-Statement of the Case set forth in the brief for the NLRB.

The NLRB found that Manpower Availability Conference (MAC) had its inception in an impasse in negotiations conducted for the improvement of salary rates and rate ranges (R. 131). It was on April 2, 1952, that SPEEA had notified Petitioner of the union's desire to amend the 1951 collective bargaining agreement then in effect between the parties (R. 27). A number of negotiating meetings were held thereafter, in which SPEEA sought an increase ranging from 28 to 36% of the then current wage and salary levels (R. 28). After meetings with the Federal Mediation and Conciliation Service, SPEEA reduced its request to a 13.5% increase, retroactive to July 1, 1952 (R. 29). On November 20, 1952, Petitioner stated what it termed its "ulti-

mate offer'' for a 6% increase (R. 37). This in some respects was less favorable than an offer made by Petitioner to SPEEA five months previously (R. 38).

There was in effect at the time a ''Gentlemen's Agreement'' between Boeing and about 80 manufacturers in the aircraft and related industries under which none of the other manufacturers was to consider for employment any engineer employed by Boeing without Boeing's consent (R. 90, 450-451). During the course of the negotiations mentioned, SPEEA had requested of Boeing that the Gentlemen's Agreement be terminated, and this request was refused (R. 308-309). The Gentlemen's Agreement operated as a restraint on the mobility of engineers (R. 91).

Essentially, the MAC was planned by SPEEA as a free market-place in Seattle to which all interested employers would be invited to interview any SPEEA member interested (R. 131-132). Its purpose and probable effects on Boeing will be referred to hereinafter.

SPEEA did not take any steps to induce Boeing employees to leave their employment; each individual employee was to make his own interviews, learn the terms of employment, if any, that might be offered and make his own decision (R. 44, 75, 366).

About 500 employees signified their willingness to attend the MAC out of 3,500 engineers employed at Boeing, and of these only 96 expressed the desire to secure other employment (R. 35-36). Only 18 manufacturers acknowledged SPEEA's invitation and only part of these said that they would attend; the project was given up for that reason (R. 53).

The MAC was to be conducted off of Boeing premises. No Boeing employee was to devote efforts to MAC on company time (R. 480, 485).

Petitioner concedes that Charles Pearson was discharged by Boeing because he took steps to put the MAC into operation. Petitioner in its Reply Brief (p. 5) suggests that the MAC was not a concerted activity of SPEEA. The Trial Examiner made the most explicit findings on this matter (R. 31-37, 42-43, 49, 61-62) which were adopted by the Board (R. 131, 137). The entire record makes it too clear for argument that everything which Pearson did in connection with the MAC was done under the order and direction of the officers, and the entire membership, of SPEEA.

The index hereof has been prepared to serve as a very brief summary of the argument to follow.

1.

The Substantial Evidence Rule Applies Herein as to All of Petitioner's Arguments

We take sharp exception to the statement of Petitioner that the question presented for review is solely one of law "in that the record shows no factual issue of moment" (Opening brief, p. 5).

By stating and treating the question presented on this appeal as if it were one of law only, Petitioner seeks to escape the effect of the "substantial evidence" rule. This rule is provided for by the Act itself. It requires the application of an entirely different standard for the review of findings of the Board than would be applicable usually in the review of findings of a

court. The Act provides that the findings of the Board "shall be conclusive" if supported by any "substantial evidence." The usual, stricter standard of "preponderance" of evidence has no application.

Section 10 (e) of the Act, relating to petitions by the Board for enforcement of orders, provides that

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 10 (f), relating to review proceedings on petition of "a person aggrieved," provides that

> "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The following are some of the many cases decided on this point subsequent to the enactment of the Administrative Procedures Act of June 11, 1946 (5 U.S.C., Sec. 1001 *et seq.*):

John Hancock Mutual Life Ins. Co. v. NLRB (CA, D.C., 1951) 191 F.(2d) 483;

NLRB v. Carpet Linoleum & Resilient Tile Layers Union No. 419 (CA-10, 1954) 213 F. (2d) 49;

NLRB v. Cold Spring Granite Co. (CA-8, 1953) 208 F.(2d) 163;

NLRB v. Deena Artware, Inc. (CA-6, 1952) 198 F.(2d) 645, cert. denied 73 S.Ct. 644;

NLRB v. Electric City Dyeing Co. (CA-3, 1950) 178 F.(2d) 980.

In *NLRB v. Deena Artware, Inc.,* 198 F.(2d) 645, the factual question was whether the picketing of the union was such as to consist of a primary or a secondary boycott. This was held on appeal to be a question of fact, not to be disturbed if supported by substantial evidence.

In *NLRB v. Electric City Dyeing Co.,* 178 F.(2d) 980, *supra,* the question was whether defendant had discharged certain persons because of union activities. The court stated:

> "We are concerned here, as in the Condenser case, with a question of fact concerning human motives, 'namely the real reason for the discharge,' 128 F.(2d) at page 74. *If the record permits conflicting conclusions as to the real reason for the discharge, we may not disturb a permissible conclusion reached by the Board.*" (*Ibid,* p. 982; italics ours)

Most of the findings of fact made by both the Trial Examiner and the NLRB support SPEEA and where there are differences between the two sets of findings it is because the NLRB rejected certain findings and recommendations made by the Trial Examiner in favor of Boeing and made substitute findings in favor of SPEEA. The record herein taken as a whole supports SPEEA even when tested by the preponderance of the evidence, let alone substantial evidence.

All of Petitioner's argument turns largely upon a version of facts adopted by Petitioner in disregard of these findings. Thus, the first 44 of the 47 pages of Petitioner's opening brief are devoted to two arguments. The first is, that Pearson's discharge was proper because he was engaged in activities not protected by Sec-

tion 7 of the Act (pp. 20-40). This argument turns upon the question as to what the purposes and effects of the MAC were. That question is bound up with such specific factual matters as the following, all of which were taken up at the hearing before the Trial Examiner: whether SPEEA conducted the MAC for purposes of collective bargaining or for other purposes; whether SPEEA induced, or planned to induce, an exodus of engineers to leave Boeing permanently (as Petitioner claims throughout its briefs) or whether SPEEA simply afforded arrangements whereby individual engineers might meet various employers and make their own decision with respect to their continued employment after securing information as to the terms of employment available; whether the "Gentlemen's Agreement" existing between Boeing and about 80 other members of the Aircraft Industries Association operated as a restraint on the freedom of SPEEA members to secure alternate employment.

The second argument in the opening brief of Petitioner is to the effect that Pearson's discharge was proper because the activities for which he was discharged amounted to a refusal to bargain in good faith on the part of the Union (pp. 40-44). This argument also turns upon the factual questions relating to the MAC above mentioned and involves the additional, factual, question as to what the intent or state of mind of SPEEA officials was.

The third argument of Petitioner, that Pearson was properly discharged for "cause" under Section 10 (c) of the Act (pp. 44-47) turns on the other two.

2.

Petitioner Disregards the Findings of the Trial Examiner and the Board as to the Real Purposes of MAC, Which Findings Were Supported by Substantial Evidence, and Claims in the Absence of Any Evidence That Great Damage Would Result to Boeing

Petitioner argues that the MAC amounted to more than a conditional threat to leave employment if satisfactory terms were not given by the employer. Petitioner urges that the real purpose of the MAC was to induce substantial numbers of the Company's engineers to leave the Company's employ. (Opening brief, pp. 8, 33). Petitioner argues that the MAC went so far as to amount to a rejection of the bargaining principle—*i.e.,* that SPEEA was not attempting, by the use of the MAC to further bargaining in good faith (*ibid.,* p. 43). Petitioner repeats frequently the use of the word "punitive" used by SPEEA in certain publicity (R. 9, 33, 36) and goes so far as to argue:

> "The contention that important objectives of the plan were 'to obtain data concerning the "market value" of engineers' (R. 32, 477) and 'to provide a meeting place where prospective employers could be contacted on an exploratory basis' (R. 32, 477) can hardly be regarded seriously." (Reply brief, p. 4)

Petitioner coined the phrase "primary intended result" which is used throughout its briefs. This is for the purpose of developing the impression that achieving terminations of employment in large numbers was the principal purpose of the MAC.

Petitioner's argument covers the same subject-mat-

ter to which the hearing before the Trial Examiner was devoted. The Trial Examiner made explicit findings on the purposes of MAC (R. 61-62, 86-87). He stated in part:

> *"Upon the entire record, there can be no doubt that the MAC was conceived as a device reasonably calculated to assist the Union, a labor organization; its stated purposes, as set forth in Pearson's testimony and in several communications to SPEEA members and the Respondent, were clearly intended to strengthen the position of the Union in the negotiations then current. I so find. . . .* Over and above any value such activities could be expected to have as a form of assistance to particular engineers who desired more lucrative employment elsewhere, *the MAC was clearly intended to make possible a strong Union line in the current negotiations for the anticipated benefit for those engineers who made no effort to leave."* (R. 61-62; italics ours)

The principal factual argument presented by Petitioner in its briefs herein is, that the MAC amounted to substantially more than a conditional threat of resignation in case that SPEEA's terms were not met. It is significant that the Trial Examiner, after seeing and hearing all of the witnesses, found this contention to be "without merit." He dealt with this subject in the following, explicit terms:

> "(The Respondent has contended that the activities of SPEEA and Chairman Pearson of the MAC committee, at the time of his discharge, amounted to *overt acts* that went far beyond any 'threat' by employees to abandon their employment conditioned upon certain demands being met. Essentially it is argued that it was SPEEA's declaration of

its intention to hold MAC if negotiations collapsed which involved the threat, but that the *activation* of the MAC and the *issuance of the invitations for it* constituted the first overt act in the anticipated 'abandonment' of their employment by a number of the Respondent's engineers. *Without regard to my disposition, elsewhere in this report, of the Respondent's other contentions, I find this one to be without merit.* The Respondent has attempted to equate a course of conduct, directed generally to *the organization* of the MAC with its possible and foreseeable *results* in particular cases. The argument is not persuasive.) (R. 86-87; italics ours)

Petitioner duly took exceptions to the findings of the Trial Examiner, which embody essentially the same factual contentions as those repeated in its briefs herein. In its exception number 1 Petitioner stated:

"1. Respondent excepts to the Trial Examiner's finding to the effect that the primary objective of the MAC was 'to make possible a strong Union line in the current negotiation.' Respondent does not except to any finding that the MAC at one time was intended to have such an objective, in the early stages of its development, but such finding of the Trial Examiner fails to recognize that the prime objective of the MAC, after it had passed from the stage of threat to the stage of overt actuality, was no longer to facilitate and improve the charging union's bargaining position, but rather actually to induce and cause employees represented by the charging union to leave Respondent's employ." (R. 122)

In its exception number 4, Petitioner excepted to the failure of the Trial Examiner "to find that the charging union's plan to conduct an MAC . . . involved a re-

jection of the 'mutual obligation' fixed by the statute . . . to confer in good faith . . . and . . . a refusal to bargain collectively" (R. 123-124).

In its exception number 6, Petitioner excepted to the Trial Examiner's "finding that the MAC as projected, involved nothing more than a conditional indication that resignations might reasonably be expected to occur in the future if the Respondent failed to meet the charging union's conditions," repeating the same contentions summarized by the Trial Examiner in the quotation from his findings above set forth (R. 124-125).

In its exception number 9, Respondent took issue with "the Trial Examiner's finding that the charging union did not intend to induce its members to abandon their employment," referring to actions of SPEEA officials and to SPEEA publications that are mentioned in Petitioner's briefs herein.

The Board in effect overruled all these exceptions.

It first adopted those findings of the Trial Examiner which were consistent with its Decision and Order; this would include the adoption of the Trial Examiner's findings quoted above (R. 131).

The Board then states the purposes of the MAC as follows:

> "The Manpower Availability Conference was initiated to achieve two principal objectives—for purposes of mutual aid or protection, to secure other employment for those Union members who desired to change employment, and possibly to counteract the effect of the Gentlemen's Agreement, and for purposes of collective bargaining, to

> strengthen the Union's hand in its negotiations with the Respondent." (R. 135)

After distinguishing various types of cases, including the type where there is "engaging in conduct which cast doubt on the Union good faith at the bargaining table," the Board states that the Union's "concerted activity . . . was subject to none of these disabilities" (R. 137). Rejecting Petitioner's contention regarding SPEEA's taking steps to induce or cause mass terminations, the Board stated:

> "There was here in essence only a conditional threat that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bargaining demands, conduct which the Board, with Court approval, has held to be protected concerted activity." (R. 137)

There was not only substantial evidence but also a preponderance of the evidence supporting these findings of the Trial Examiner and the Board (R. 44, 75, 266, 356, 357, 359).

Mr. Gardiner, Chairman of the SPEEA executive committee, emphasized the point, which Petitioner in absence of contrary evidence now attempts to discount, that the negotiations turned largely on the determination of what the available rates from other firms might be. The Company and SPEEA were having trouble in agreeing on what the degree of difference was (R. 266). The Company had professed the policy of facilitating a departure where an employee found that he could better his salary elsewhere and was dissatisfied for that reason (R. 356). Determining what in actual fact were the terms available elsewhere, through a market me-

chanics such as the MAC, became a matter of primary concern to SPEEA.

Actually, such an arrangement as MAC turns out to be a test of the good faith of the parties on the key issue in the negotiations: whether the salary rates at Boeing were comparable to those offered elsewhere. If they were, all but a negligible number of the engineers would stay at Boeing, especially when to accept new employment would be to undertake a change of residence. In this event, the source of dissatisfaction among Boeing engineers would be removed and the pressure would be on the Union to settle with Boeing. On the other hand, if the rates offered by others were higher and Boeing stubbornly refused to meet the scale, some engineers would leave. As American citizens they have that right.

Petitioner greatly exaggerates the effect of The MAC if successful, basing its argument upon speculative testimony of a Boeing witness given in response to a hypothetical question unsupported by fact

The only evidence on possible damage to Boeing if the MAC were held was in the form of an opinion given by Mr. Logan, Vice-President of Boeing, given in response to a hypothetical question. *The question asked presupposes facts contrary to the record.*

The question asked was:

> "Q. Assuming that a substantial number of Boeing engineers in the SPEEA unit, say 500, were to leave the employ of Boeing at the same time, or within a short period, have you an opinion as to the effect that such a development would have upon the operations of the company's Seattle Division?" R. 426)

Notice that *the fact assumed by the question was that 500 engineers would leave Boeing at the same time.* The only reason that 500 rather than some other figure was selected by counsel was, that this was the total number of engineers pledged to attend MAC. *The question assumed that every engineer who attended would leave Boeing.* In contrast, *only 96 enginers had expressed the desire to change companies,* out of the 500 pledged to attend MAC. If the question had been proper at all, it should have been based upon facts in the record.

Mr. Logan's testimony given in response to this hypothetical question is both self-serving and speculative (R. 426-427). He stated that the effects turned "on the number of engineers who left and the rate at which they left" (R. 426) which of course would be under the control of Boeing by seeing to it that its terms of employment were competitive.

The MAC was intended as an expedient less drastic than a strike; if successful any pressure resulting therefrom would have been less

It is indisputable that if SPEEA had conducted a successful strike, Boeing would have faced the risk of losing not simply a portion of the 500 engineers expected to attend the MAC but many other employees also. 3500 engineers would have been thrown out of employment. In addition, there would have been several times that number of employees in other classifications. It is common knowledge that a strike if at all protracted results in a substantial portion of employees out of work going elsewhere. The effects of plant closure on business are obviously of a most drastic kind.

The record is almost indisputable that SPEEA intended to avoid a strike because it did not want to be so drastic (R. 357-359). As an organization composed of professional men, it was much more reluctant in this respect than the average labor union.

In letters to SPEEA at the time, in which Boeing's position was stated, no argument was made that the potential damage to Boeing would outrun a strike; the argument was simply that SPEEA could not resort to such action as the MAC unless the organization was out on strike (R. 51-52).

Petitioner's argument in its briefs comes now as after-thought having no basis either in the findings or in any substantial evidence.

3.

Petitioner Distorts the Problems Posed for SPEEA by the "Gentlemen's Agreement," Which Afford Independent Justification for SPEEA's Holding the MAC

The text of the "Gentlemen's Agreement" should be noted. It is in the form of a resolution adopted by the Aircraft Industries Association about three years previously (R. 435), reading:

> "There is no middle ground that will cure this problem. Pirating must be discouraged and *to that end the following practices are condemned:*
>
> "1. Advertising for employees in cities where member companies are located elsewhere unless the member company or companies located in the particular city so agree.
>
> "2. *Offering employment to employees working for other member companies unless member com-*

pany where applicant is currently employed so agrees. This applies to offers made either directly or through subcontracting companies or employment agencies." (R. 450-451; italics ours.)

The Trial Examiner stated:

"There can be no doubt that the 'Gentlemen's Agreement' does impair the freedom of engineers to seek employment elsewhere in the field of aircraft manufacture—at least to some extent—since an employer other than his own conceivably may anticipate, reasonably enough, that his relationship with his superiors in current employment could be impaired as a result of their awareness of his attempt to secure work elsewhere, if that attempt proved unsuccessful." (R. 91)

The Board took note that one of the purposes of the MAC was "possibly to counteract the effect of the Gentlemen's Agreement (R. 135). The word "possibly" was obviously used in the same sense that SPEEA used it in its questionnaire-ballot (R. 479), as meaning to counteract the Agreement, if possible, by recourse to MAC. The Board in a footnote stated that the question whether the MAC in fact restricted employment opportunities is immaterial because the question whether such activity is protected "does not depend on whether or not it is necessary" (R. 135). We agree, but suggest that the extent to which necessity was presented affords additional, independent, justification for the MAC.

Attempting to meet the effects of the Agreement was a purpose emphasized strongly in the questionnaire-ballot mentioned:

"Second, 'Is it ethical?' There is nothing unethical about providing a time and place for these

two groups to get together. After all, it is Boeing policies which provide the impetus for a change, not SPEEA. *Anyway, Boeing has set the ethical standard with their Gentlemen's Agreement.* Third, *'Won't the Gentlemen's Agreement of the Aircraft Industries Association be a hindrance?' Possibly, but we have a method which might get around that for some engineers, namely, expressing willingness to AIA members to notify Boeing in advance of plans to seek employment elsewhere."*

(R. 479; italics ours)

The Vice-President of Boeing admitted on cross-examination that "It had been the policy of the Boeing Airplane Company to conform its practice to that policy as set forth in paragraph 2 of the resolution" (R. 441, 451).

Illustrative letters are in evidence wherein members of the Aircraft Industries Association had refused consideration of employment applications made by SPEEA members, in compliance with the resolution above mentioned (R. 507-511; General Counsel's Exhibits 11-16). SPEEA members had brought these letters to the attention of SPEEA officials, who in turn had requested Boeing to cease and desist from any further observance of the Gentlemen's Agreement (R. 308-309).

The "Gentlemen's Agreement" of the Aircraft Industries Association went so far as to violate the anti-trust laws

It is submitted that the restraint on the mobility of engineers in securing employment caused by the Gentlemen's Agreement constituted a clear violation of the Sherman Anti-Trust Act (15 U.S.C.A., Sec. 3, *et*

seq.). The restraint need not be "complete" or its observance "rigid" to have that effect.

It has been held that restraints upon the mobility of labor in interstate commerce violate the Sherman Act fully as much as restraints upon the mobility of commodities.

> *Anderson v. Ship Owners' Ass'n.* (1926) 71 L.Ed. 298, 272 U.S. 359.

There, the Ship Owners' Association required that its members not accept any seaman for employment unless he registered with it, received a number, and waited his turn for employment. The result was, "that seamen, well qualified and well-known, are frequently prevented from obtaining employment at once, when, but for these conditions, they would be able to do so." (71 L.Ed. at p. 301). Action was brought by a seaman against the Association to enjoin the restraint. The Supreme Court reversed a decision of the Circuit Court of Appeals and held that the complaint stated a cause of action.

Restraint upon the pursuit of professional calling was held invalid by the Supreme Court in

> *American Medical Association v. U.S.* (1943) 317 U.S. 519, 87 L.Ed. 434.

Petitioner claims that the Gentlemen's Agreement was conceived for the welfare of the Aircraft Industry. However, the claim or even the existence of benevolent motive does not sanction conduct otherwise in violation of the Sherman Act;

> *United States v. U.S. Gypsum Co.* (1950) 340 U.S. 76, 95 L.Ed. 89;

Fashion Originators' Guild of America, Inc. v. Federal Trade Commission (1941) 312 457, 85 L.Ed. 949;

Standard Sanitary Mfg. Co. v. U.S. (1912) 226 U.S. 20, 57 L.Ed. 107.

Petitioner claims that Boeing did not enforce the Gentlemen's Agreement.

If the combination is for the restraint of trade the existence of the power to restrain is sufficient in itself to render it unlawful:

U.S. v. Maryland & Virginia Milk Producers' Ass'n, et al (U.S. Dist. Ct., D.C., 1949) 90 F. Supp. 681:

> "The power to determine or fix prices from time to time involves potential danger. * * * In this case, to be sure, there is no evidence of the misuse of the power. The anti-trust laws, however, are not aimed solely against abuse of power. They are directed against the very existence of the power." (*Ibid,* p. 688).

4.

SPEEA's Conduct of the MAC Was Legally Protected as Constituting an Employment and Information Service for Its Members

The applicable language of Section 7 has been in effect since the original enactment of the National Labor Relations Act; it provides:

> "*Employees shall have the right* to self-organization, to form, join or assist labor organizations, *to bargain collectively* through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargain-*

ing or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." (Italics ours)

It is submitted that even apart from the question as to the effect of the Gentlemen's Agreement and the pendency of bargaining negotiations, SPEEA was permitted to conduct the MAC as an employment and information service to its members, this being for the purpose of the members' "mutual aid or protection." The existence of the Gentlemen's Agreement and the pendency of the negotiations provided additional, although unnecessary, justification.

In two A.L.R. articles there is an exhaustive review of the NLRB and court decisions relating to the varied purposes for which a union or group of employees may take concerted action for purposes other than collective bargaining:

> 6 A.L.R.(2d) p. 416 *et seq. "Right of Collective Action by Employees as Declared in Section 7 of the National Labor Relations Act,"* esp. par. 8 *et seq., "Right to engage in concerted activities,"* pp. 433, *et seq.;*
>
> 19 A.L.R.(2d) 566, *"Spontaneous or informed activity of employees as that of 'labor organization' or as 'concerted activities' within protection of Labor Relations Act."*

The first article, above, was published in 1949, the second in 1951.

In 19 A.L.R.(2d) 566, the generalization is made, at p. 569:

> "Just as a liberal interpretation has been given to the term 'labor organization,' so also the National Labor Relations Board and the courts have given a broad interpretation to the 'concerted activities' on the part of employees which are protected by Sec. 7. Since such activities are not confined to the purpose of collective bargaining but also include activities for 'other mutual aid or protection,' it has been held that protected activities include almost everything in which the employees could be found to have a legitimate interest."

Senator Taft, as one of the framers of the NLRB Act, himself recognized that a Union might perform the functions of an employment agency. His remarks implying this are cited in a footnote, in *"In the Matter of International Longshoremen's and Warehousemen's Union, et al.,* 90 NLRB 1021, at page 1069:

> "If in a few rare instances the employer wants to use the Union as an employment agency, he may do so; there is nothing to prevent his doing so. But he cannot make a contract in advance that he will only take the men recommended by the Union."

The Board and the courts have taken for granted the legality of the Union's operating a hiring hall or employment agency:

Brown v. National Union of Marine Cooks and Stewards (U.S. Dist. Ct., N.D., Calif., S.D., 1951) 104 F.Supp. 685;

NLRB v. National Maritime Union of America (C.C.A.-2, 1949) 175 F.(2d) 686;

In the Matter of National Union of Marine Cooks and Stewards (1940) 90 NLRB 1099;

NLRB v. Swinerton & Walberg (CCA-9, (1953) 202 F.(2d) 511; cert. denied 346 U.S. 814, 98 L.Ed. 341;

NLRB v. International Longshoremen's Union (CCA-9, 1954) 210 F.(2d) 581.

It is elementary economics that if a given employer fails to offer competitive terms of employment, his employees will utilize the union hiring hall or employment office and work elsewhere. Petitioner's argument herein that a MAC would result in terminations could as well be made of a union hiring hall.

At page 10 of its reply brief, Petitioner states that

> "Boeing is the only aircraft manufacturer in the Pacific Northwest and, unlike the situation in the Los Angeles area, a move by one of Boeing's employees to another aircraft manufacturer involves, in most instances, a change of residence."

We agree. This very circumstance renders it necessary for SPEEA to establish and maintain contacts with other aircraft manufacturers located elsewhere in the United States to assure competitive terms at Boeing. Without such a mechanics as a MAC, SPEEA members would be Boeing captives, left to accept such terms as the Company wished.

The case of *Metal Moldings Corporation* (1942) 39 NLRB 107, which might on first sight seem *contra,* is readily distinguishable. Here an employee was held to be properly discharged where he solicited fellow employees to seek employment at a competing factory in which the employee's father was a foreman. Wholly lacking was the element of concerted activity author-

ized or sponsored by a labor union, contemplated in Section 7. The Board stated:

> "The action was that of the individual employee only. Also lacking was a most important requirement, that the action to be protected must be 'for the purpose of collective bargaining or other mutual aid or protection' of the employees."

Petitioner in effect concedes that a union may operate a hiring hall or employment office, but argues that this has been and must be confined to securing jobs for the unemployed members (opening brief, p. 12). There is nothing in the record to suggest that any union hiring hall ever has been so restricted in its purpose, and no authority whatsoever is cited to support the view that it must be.

The only argument available to Petitioner on this subject would be, that SPEEA was taking steps to induce employees to leave Boeing. This is a question of fact. We have seen that both the Trial Examiner and the Board made explicit finding on this point rejecting Petitioner's contention (R. 44, 75, 137).

5.

Petitioner Would Have This Court Adopt a Vague and Subjective Standard of "Protected" Concerted Activity, Amounting to an Invalid Delegation of Legislative Authority to the NLRB

The Trial Examiner had adopted the test of "improper" or "indefensible" as measuring the limits of protected, concerted activity under Section 7. In doing so, he reflected misgivings and a consciousness that the application of such a standard in practice would amount

to a delegation of law-making power to the NLRB. He stated:

> "The disposition of the ultimate question, however, has not been easy. Fundamental considerations of statutory policy, and the place of the agency in the American constitutional scheme, are involved. *Does not the exercise of the wide discretion implied in the use of 'indefensibility' as a standard of judgment imply that the Board may be called upon in these cases, to exercise a 'legislative' function in its decisional process?* But if so, may not Congress have expressly so intended. See the House Conference Report, previously noted." (R. 82-83; italics ours).

Both the majority and the minority of the NLRB accordingly rejected the rationale recommended by the Trial Examiner, turning on the tests of "improper" or "indefensible." (R. 137, 135)

Petitioner now would have this court return to such standards, conceding at times they have been given no definite limitation (or definition) by the courts:

> "The terms 'disloyal,' 'unlawful,' 'improper,' 'indefensible' and 'illegal' are broad terms and the decisions have suggested no particular limitation to their scope." (Opening Brief, p. 26)

The constitutional point is a fundamental one, that the exercise of discretion by an administrative board such as the NLRB must be in accordance with reasonably definite standards set forth in the Act itself. Otherwise the board is given a latitude so wide for its decisional process that it in substance would be exercising legislative functions, contrary to the provisions of the

Federal constitution vesting all legislative powers in the Congress. A leading case is

Schechter v. United States (1935) 79 L.Ed. 1570, 295 U.S. 495.

Here the Industrial Recovery Act was held invalid. In substance, it delegated legislative authority to the President with respect to the approval or disapproval of industrial codes. The Act authorized the President to approve such a code if it met the standard of "fair competition" for the trade or industry concerned (79 L. Ed. at p. 1582). Notice that this standard is more definite than would be the one of "propriety" or "defensibility." In writing the opinion for the court holding the act unconstitutional, Chief Justice Hughes stated:

> "Second, the question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Co. v. Ryan,* 293 U.S. 388, *ante,* 446, 55 S.Ct. 241. The Constitution provides that 'all legislative powers herein granted to be vested in the Congress of the United States, which shall consist of the Senate and House of Representatives.' Art. I, Sec. 1. And the Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution' its general power. Art. I, Sec. 8, Par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. * * *
>
> "Accordingly, *we look to the statutes to see whether Congress has overstepped these limitations—whether Congress in authorizing 'codes of*

> *fair competition' is thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."* (79 L.Ed. at p. 1580; emphasis supplied.)

Petitoner suggests that Section 7 must be related to the policy statements found in Section 1 of the Act, and construed to permit only the type of activity conducive to

> "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."

A reading of Section 1 makes it obvious that it does not purport to restrict the effect of Section 7; and the language cited is not sufficiently definite to constitute a standard to measure the Board's authority.

Neither the Court nor the Board decisions have the broad implications contended for by Petitioner

The two A.L.R. articles previously mentioned constitute a careful analysis of Board and court decisions analyzing the permissible scope of concerted activity under Section 7.

> 6 A.L.R.(2d) 416, *et seq., "Right of Collective Action by Employees as Declared in Section 7 of the National Labor Relations Act,* esp. par. 8, pp. 433, *et seq.,* "Right to engage in concerted activities."
>
> 19 A.L.R.(2d) 566, *"Spontaneous or informed activity of employees as that of 'labor organization' or as 'concerted activities' within protection of Labor Relations Act."*

These A.L.R. articles set forth many of the cases cited by Petitioner herein, and show that the cases cited do not have the broad implications contended for by Petitioner. The doctrine of the leading case of *NLRB v. Peter Cailler Kohler Co.* (C.C.A.-2, 1942) 130 F.(2d) 503, is recognized, that the Act guarantees to employees the right to engage in such concerted activities for purposes of collective bargaining, etc., as do not violate the Act itself, some other statute, or the common law. Petitioner suggests, at page 31 of its opening brief, that this case represents a theory "long since obsolete, particularly in view of the Supreme Court in the *Jefferson Standard* case." The United States Supreme Court just last year recognized the *Peter Cailler* case, citing it with approval in

> *Radio Officers Union, etc., v. NLRB,* 347 U.S. 17, 98 L.Ed. 455 (Note 39, p. 477).

NLRB v. Local Union No. 1229, I.B.E.W., 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195, Distinguished.

This case is the principal one relied upon by Petitioner. Here the union had been conducting a strike and peaceful picketing when several members embarked upon a frolic of their own, giving rise to the questions presented in the case:

> "But on August 24, 1949, a new procedure made its appearance. Without warning, *several of its technicians* launched a vitriolic attack on the quality of the company's television broadcasts. * * * The handbills *made no reference to the union, to a labor controversy or to collective bargaining.*" (98 L.Ed. p. 200; italics ours.)

The court [in holding that the Board correctly

denied reinstatement to these employees] based its result on two grounds: (a) that no activity of the union was presented, and (b) the activity of the individuals was deliberately disassociated from collective bargaining—the antithesis of the requirement of Section 7 that it be for collective bargaining to be protected.

The court stated:

> "Their attack related itself to no labor practice of the company.
>
> * * *
>
> "In contrast to their claims on the picket line as to the labor controversy, their handbill of August 24 omitted all reference to it. The handbill diverted attention from the labor controversy." (*Ibid.*, 98 L.Ed., p. 204)

The Board had found that the attack of the technicians was separate from the labor controversy (98 L.Ed., p. 205).

Comparable facts would be presented herein if several Boeing engineers had circulated a libelous handbill attacking the quality of Boeing airplanes, doing so in such a manner as deliberately to divert attention from the SPEEA-Boeing controversy.

What the court really was concerned with was whether the Board had correctly concluded that the employer had discharged the technicians "for cause" independent of the labor controversy so as not to be liable for reinstatement under Section 10(c) of the Act. Having found that the handbill was unrelated to the labor controversy, the court refers to such factors

as "disloyalty" and "indefensible" to show what the independent reasons for discharge were that the employer had (*Ibid.,* 98 L.Ed., pp. 204-205). Thus the court stated:

> "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." (98 L.Ed., p. 204)

The court, in deciding that the technicians had been discharged for "a separable cause," not because of concerted activities, simply applied the plain langauge of Section 10(c) to affirm denial of reinstatement. Conversely, if confronted with findings that Mr. Pearson in the instant case was discharged because of his participation in the concerted activities of SPEEA, it would affirm an order of reinstatement.

Other Court decisions cited by Petitioner distinguished

At pages 22 and following of its opening brief, Petitioner cites a number of court and Board decisions relating to the scope of protected activity under Section 7. We propose to refer briefly to every one of these. Their inapplicability becomes obvious once that their *facts* and *holdings* are examined.

At page 22, Petitioner reproduces a quotation taken out of context from the case of *Joanna Cotton Mills v. NLRB* (CCA-4, 1949) 176 F.(2d) 749. There the

circuit court had under consideration a petition to review and set aside an order of the NLRB requiring the Cotton Mills Company to reinstate a discharged employee. The facts were, that the employee "had been operating a punch board or raffling device on the company's premises and had been loitering around a woman weaver as she was engaged in her duties." The overseer directed his assistant, Mr. Lewis, to warn the employee. When Lewis spoke to the latter the employee "became very angry, used harsh and insulting language and assumed an insubordinate attitude." He followed this up by circulating a petition among the employees for the discharge of Lewis and presented it to the employer. The court held that there was no substantial evidence in the record supporting the view that the petition was circulated for the purpose of advancing some cause of the union, rather than to vent spleen on Lewis and modified the Board's order on this ground. The court stated:

> "It is clear, however, that to be protected the purpose of the concerted activities must be the mutual aid or protection of the employees; and it is equally clear that the circulation and presentation of the petition here involved was for no such purpose, but was nothing more or less than an effiort on the part of Blakely to vent his spleen upon a supervisory employee whose rebuke in the performance of duty had angered him." (*Ibid,* p. 753)

The only other court cases cited by Petitioner are the following:

> *NLRB v. Fansteel Metallurgical Corp.* (1939) 306 U.S. 240, 83 L.Ed. 627;

NLRB v. Kelco Corp. (CCA-4, 1949) 178 F. (2d) 578;

International Union, et al. v. Wisconsin Employment Relations Board, et al. (1949) 336 U.S. 245, 93 L.Ed. 651;

NLRB v. Draper Corp. (CCA-4, 1944) 145 F. (2d) 199;

NLRB v. Massen Gin & Machinery Works, Inc. (CCA-5, 1949) 173 F.(2d) 758;

NLRB v. Montgomery Ward & Co., Inc. (CCA-8, 1946) 157 F.(2d) 486;

Conn Limited v. NLRB (CCA-7, 1939) 108 F. (2d) 390;

Hoover Co. v. NLRB (CCA-6, 1951) 191 F. (2d) 380.

In *NLRB v. Fansteel Metallurgical Corp.,* 83 L.Ed. 627, the U.S. Supreme Court affirmed a decision of the Circuit Court of Appeals setting aside portions of a Board order requiring reinstatement of employees who had participated in a sit-down strike in which the union seized certain buildings. The court based its result on the ground that this action was illegal. The court stated:

> "Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit." (83 L.Ed. at p. 633)

The next court decision cited by Petitioner is *NLRB*

v. Kelco Corp. (CCA-4, 1949) 178 F.(2d) 578. Here the court had before it a petition to enforce an order of the NLRB directing reinstatement of certain employees with back pay. As to the employees in question,

> "Respondent offered evidence, which the trial examiner refused to receive, to the effect that they assaulted one of respondent's workers who was a non-striker and chased him home and that they knocked down in the street another non-striker and beat him after he was down." (*Ibid,* p. 579)

The court of course remanded the case with directions to the NLRB to receive the evidence offered.

In the next cited case, *International Union v. Wisconsin Employment Relations Board* (1949) 336 U.S. 245, 93 L.Ed. 651, the case came up on writs of certiorari directed to the Supreme Court of Wisconsin to review judgments reversing lower court orders relating to the enforcement of orders of the Wisconsin Employment Relations Board. The activity involved consisted of a series of intermittent and unannounced work stoppages which had been conducted on company time. The question presented was, whether the State of Wisconsin through its board had jurisdiction to enter any order relating to termination of the work stoppages or whether jurisdiction for that purpose was preempted by the Federal Government through enactment of the National Labor Relations Act. The court held that the State of Wisconsin retained jurisdiction to enter orders on such subject-matter.

The case thus throws little light on the problem at hand, but deals with a separate question of Federal vs. State jurisdiction.

In the next case, *NLRB v. Draper Corporation* (CCA-4, 1944) 145 F.(2d) 199, the union and the employer were engaged in collective bargaining with the company. A small group of employees instituted a "wild cat" strike, which the court found to have been for *the purpose of interfering with the collective bargaining of the union.* For that reason the court held that the participants, having violated rights guaranteed by the Act were not entitled to its protcetion, stating that it did so

> "because we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees." (*Ibid,* p. 202)

Again, the court stated:

> "What we do mean to say is that minorities who engage in 'wild cat' strikes, in violation of rights established by the collective bargaining statute, can find nothing in the statute which protects them from discharge." (*Ibid,* 205)

In *NLRB v. Massen Gin & Machinery Works, Inc.* (CCA-5, 1949) 173 F.(2d) 758, the court denied a petition to enforce a Board order for reinstatement of striking employees without writing any opinion; there is neither an analysis of the law nor statement of facts therein.

In *NLRB v. Montgomery, Ward & Co., Inc.* (CCA-8,

1946) 157 F.(2d) 486, three employees in the Kansas City plant of the Company while at work refused to process orders for delivery to another plant of the Company in Chicago, where an affiliated local was then out on strike. Absent is the requirement of "concerted activity," since the three did not take their action for their union local; beyond that is the element of outright disobedience on the employer's time and premises.

In *C. G. Conn, Ltd., v. NLRB* (C.C.A.-7, 1939) 108 F.(2d) 390, the employees refused to work overtime, leaving their employment without warning at the end of their regular hours. The employees were discharged and ordered reinstated by the Board; the court denied an order of enforcement on the ground that the employees were attempting unilaterally to dictate the conditions of their employment:

> "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. This is plainly what was sought to be done in this instance. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (*Ibid.*, p. 397)

It may be seriously questioned to what extent this holding will be followed by other courts, but the result can be justified on the theory that one of the terms of the contract of employment is the employee's obligation at common law to accord with the employer's reasonable directions while performing work for the employer. It would not sanction such restrictions upon the employees' free time as Petitioner contends for in this case.

In *Hoover Co. v. NLRB* (CCA-6, 1951) 191 F.(2d) 380, the United Electrical Workers' Local and another union were competing for NLRB certification. The former instituted a national boycott against the employer's product. It did so during the course of the certification election in violation of section 8(a)(1) of the Act. All the while the employees remained at work. The court stated:

> "In this case, since the United Electrical Workers Union was guilty of instigating a boycott for an unlawful purpose, such concerted activity was not protected by the Act." (*Ibid.*, p. 386)

Petitioner's NLRB Cases Distinguished

Several of the NLRB cases cited by Petitioner deal with interference with the terms of employment by activities conducted on the job. Thus, in *Honolulu Rapid Transit Co.*, 110 NLRB No. 244, 35 LRRM 1305 (1954), the employees refused to work week-ends during negotiations for a new contract, thereby interfering seriously with transit operations. In *Pacific Telephone Co.*, 107 NLRB No. 301, 33 LRRM 1433 (1954), the employees conducted a "hit and run" strike, executing a plan for intermittent, unannounced work stoppages by portions of the employees for the deliberate, announced, object of crippling communications. In *Textile Workers, CIO* (Personal Products Corp.) 108 NLRB No. 109, 34 LRRM 1059 (1954), there was both a refusal to work overtime and a deliberate slow-down while at work. In two other cases there was a refusal to work overtime, namely: *Valley City Furniture Co.* (1954) 110 NLRB

No. 216, 35 LRRM 1265, and *Phelps Dodge Cooper Products Co.* (1952) 101 NLRB No. 103, 31 LRRM 1072.

In two of the cases there was a complete absence of the requirement of "concerted activity," individual employees taking action, apart from authorization or participation by the union. The first is *Mt. Clemens Pottery Co.,* 46 NLRB No. 714, 11 LRRM 225 (1943) in which some of the employees refused to work overtime and also pulled a switch to stop plant production. The second is *Montgomery Ward & Co.,* 108 NLRB No. 152, 34 LRRM 1123 (1954), in which two employees, while at work made statements to customers for the purpose of discouraging their transacting business with their employer during a labor dispute.

In *Washington National Insurance Co.,* 64 NLRB 929, 17 LRRM 154 (1945), the employee discharged was an insurance salesman and sold insurance for a rival company in violation of his express agreement with his employer to devote full time to his employer's business; also, he knowingly falsified an insurance application.

Most of the Board decisions referred to are lacking in court approval and it may be questioned whether this will be given or withheld. The question is an academic one insofar as this case is concerned, however. The types of concerted activity prescribed by the Board in each instance go considerably beyond that shown by the findings made by the Board and the Trial Examiner with respect to the MAC herein.

In conclusion, the Decision and Order of the Board should be affirmed.

Respectfully submitted,

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No. 14540

United States Court of Appeals

For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF BOEING AIRPLANE COMPANY IN ANSWER TO BRIEF OF AMICUS CURIAE REPRESENTING SPEEA

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BRIEF OF BOEING AIRPLANE COMPANY IN ANSWER TO BRIEF OF AMICUS CURIAE REPRESENTING SPEEA

The brief of the Union, by its counsel as amicus curiae, was served on counsel for the Company May 13, 1955. Consent to the filing of such brief was stipulated by the Company and the Board.

The principal effort of the Union brief seems to be in the direction of characterizing the issue before the Court as one of fact rather than one of law, and then urging affirmance of the Board majority decision on the stated ground that decisions of the Board on issues of fact should be left undisturbed.

This position expressed in the Union brief runs counter to statements both by the Trial Examiner (R. 27) and by the majority of the Board (R. 131) that the facts of the case are substantially undisputed. Also, the major "factual" argument to which five pages of the Union brief are devoted (relating to the so-called "Gentlemen's Agreement") is predicated on stated "facts"

that are unsupported by and inconsistent with findings of the Board majority, such majority having stated that matters relating to the "Gentlemen's Agreement" were not regarded as material to its decision. For further discussion of the subject, see pages 6 to 10 of the Company's reply brief.

The Union brief discounts or refrains from mentioning the following findings of the Trial Examiner that have *not* been disturbed by the Board majority:

1. Finding that if the MAC had been successful, the damage to Boeing would have amounted to millions of dollars (R. 98).

2. Finding that there is no indication in the Record that the implementation of the AIA resolution by the Association's membership really "froze" engineers in their jobs (R. 91-2).

3. Finding that the character of the MAC as a counter measure to the Gentlemen's Agreement does not endow the MAC with privilege or justification (R. 93-4).

4. Finding that the contended effect of the AIA resolution would probably exist even in the absence of such resolution (R. 92).

5. Finding that the Union anticipated that the MAC would accelerate Respondent's rate of engineer turnover due to the short supply of engineers, and that such development was to be used as a bargaining lever in the negotiations (R. 97).

6. Finding that there can be no doubt of the possibility that employee attrition as a result of the MAC might have reached such proportions as substantially to affect the Company's operations (R. 100).

7. Finding that the probable harmful results of the MAC would have persisted far beyond those properly to be anticipated from a strike of reasonable duration (R. 97).

8. Finding that the MAC, if successful, could have contributed substantially to significant impairment of the Company's ability to operate, which could have lasted for a notably lengthy period of time (R. 97).

9. Finding that there was serious reason to doubt the merit of the particular benefit to themselves intended by the Union membership (R. 98).

10. Finding that there was serious reason to doubt whether the impasse in the negotiations could be said to "justify" the MAC as a device to stimulate renewed negotiations (R. 98-99).

11. Finding that the Company was justified in fearing that the successful completion of the MAC could have forced the Company to shut down several of its current projects; finding that its contracts with the Air Force might have been cancelled as a result, with immensely significant financial repercussions; and finding that the replacement of any experienced engineer who resigned, in the light of the current engineer shortage, would have taken as much as several years (R. 98).

The error in the conclusions reached by the Board majority is essentially one of misinterpreting the true intent of the statute and misapplying the statute to a Record that is substantially undisputed.

* * * *

The remainder of the Union brief for the most part

reiterates arguments that have been advanced by the Board and previously treated in the Company's briefs. Inaccuracies and inconsistencies thought to merit particular further mention are as follows:

* * * *

Page 2 of Union brief:

> "SPEEA did not take any steps to induce Boeing employees to leave their employment * * *"

Compare this statement with the fact that 2,800 letters were sent out to employers all over the country, with the elaborate preparations for the MAC that were completed, and with the extensive publicity that the Union gave to the MAC over a period of many months in which the MAC was characterized as a "punitive action to reduce the Engineering services available to Boeing" (R. 33, 478) and "to encourage engineers to seek more suitable employment elsewhere" (R. 368). The Trial Examiner found that the Union expected and intended such results (R. 97).

* * * *

Page 8 of Union brief:

> *"'* * * the MAC was conceived as a device reasonably calculated to assist the Union* * * *'"

The fact that a concerted activity is calculated to assist a union does not thereby make it protected. It cannot be argued that the sitdown strike in the *Fansteel* (*N.L.R.B. v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939)) case was not calculated to assist the union there involved.

* * * *

Page 11 of Union brief:

> "'There was here in essence only a conditional threat that some of the Respondent's employees

> would resign if the Respondent did not meet the Union's stated bargaining demands, conduct which the Board, with Court approval, has held to be protected concerted activity."

This quote from the majority Board opinion represents an attempt to draw a parallel between the instant case, and *Southern Pine Electric Cooperative,* 104 NLRB 834, 32 LRRM 1156 (1953) and *N.L.R.B. v. Martin* (*Nemec Combustion Engineers*), 207 F.2d 655, 33 LRRM 2046 (CA-9 1953) enf'g 100 NLRB 1118, 30 LRRM 1394 (1952), which parallel is not possible for the following reasons:

(a) In the instant case the program identified as the MAC had been built up by the Union over a period in excess of a year. The parties, unlike those in the *Southern Pine* and *Nemec cases* had bargained over a period of months, had reached an impasse and the final Company offer had been flatly rejected. At this point there hardly could have been a "conditional threat" to abandon employment if the Union demands were not met. The Union was well past the "threat" stage when it made the final arrangements for the MAC and sent out letters to 2,800 firms. cf. *Crescent Wharf & Warehouse Co.,* 104 NLRB 860, 32 LRRM 1157 (1953).

(b) The *Southern Pine* and *Nemec* cases both involve situations where employees threatened to quit if their demands were not met. They were not inducing or encouraging or facilitating *other* employees to terminate permanently. They were not, as Pearson was, organizing and leading a campaign to encourage and promote the terminations of *others* and the hiring of the latter by the Company's competitors.

(c) A close scrutiny of the facts in both the *Southern Pine* and *Nemec* cases shows that actually something in the nature of a strike was threatened rather than abandonment of employment.

(d) No employee, either in *Southern Pine* or *Nemec,* made any such unequivocal statement as "This is to advise you that SPEEA has started *and will complete* a Manpower Availability Conference" (R. 493) (emphasis added). It is to be noted in this respect that the SPEEA letter advising Boeing of the activation of the MAC contained no "conditional threat" of any kind and was completely silent on the matter of Boeing wages or the Union's demands in regard thereto.

(e) Damage to the employer was not an important or primary objective in either the *Southern Pine* or *Nemec* case. In neither case did the employees have in mind any punitive action to discourage new hires from coming to the employer, as here (R. 32-3, 477-8).

(f) In the *Southern Pine* and *Nemec* cases *no union or certified collective bargaining agent was involved.* In 1947 the Taft-Hartley Act amended the Wagner Act to impose reciprocal duties upon employers and collective bargaining agents alike, to bargain in good faith in accordance with the standards of bargaining required by the act. Section 8(a)(5) specifies such obligation on the part of the employer and Section 8(b)(3) imposes the identical obligation on the exclusive representative of the employees in an appropriate unit under Section 9(a) of the Act. SPEEA was such an agent. The Union brief repeatedly asserts that the MAC was an activity of SPEEA and it emphasizes and directs particular

attention to the findings of the Trial Examiner that the MAC was conceived as a device to strengthen the position of the Union in the negotiations then current (Union brief, page 8). The MAC is asserted by the Union to have been an integral part of its bargaining technique. The complaint alleges in paragraph IX thereof (R. 11) that the MAC was "undertaken to break the bargaining impasse then in existence."

It is obvious that a course of conduct cannot at once constitute both a protected activity under Section 7 and also a refusal to bargain under Section 8(b) (3). The latter section imposed no duty or standards of bargaining upon the individuals involved in the *Southern Pine* and *Nemec* cases. However, as pointed out at pages 40 to 44 of the Company opening brief, SPEEA *because it was the certified bargaining agent* was subject to Section 8(b)(3) and its course of conduct in connection with the MAC, of which Pearson's activities were a part, clearly amounted to a failure to meet the standard of bargaining required by that section and Section 8(d). The Trial Examiner declined to pass on this point because it was one of first impression (R. 76) and the Board majority makes no mention of it.

* * * *

Pages 11-12 of Union brief:

> "* * * the negotiations turned largely on the determination of what the available rates from other firms might be. * * * Determining what in actual fact were the terms available elsewhere, through a market mechanics such as the MAC, became a matter of primary concern to SPEEA."

It is unbelievable that the representatives of 2,800

firms would be summoned to Seattle for the purpose of clearing up this matter, assuming, for the moment that SPEEA lacked such knowledge.

* * * *

Page 12 of Union brief:

> "As American citizens [the employees have the right to leave Boeing]."

The right is unchallenged and its jeopardy or protection is in no way involved in the case.

* * * *

Page 12 of Union brief:

> "Petitioner greatly exaggerates the effect of the MAC if successful, basing its argument upon speculative testimony of a Boeing witness given in response to a hypothetical question unsupported by fact"

The ultimate, drastic and extended damage to Boeing in the event of a substantial exodus of its engineers as the result of the MAC is so obvious as to hardly require proof. Logan's testimony, attacked in the Union's brief, is patently conservative. The Trial Examiner, who observed the witness testify, accorded the testimony complete credence (R. 98). The majority Board opinion in no way disturbed such finding on the part of the Trial Examiner. Compare the Union's argument, earlier in its brief, as to the weight to be accorded the findings below. The Record is undisputed that a successful MAC would result in material damage to Boeing (R. 420), as shown by the findings heretofore mentioned of the Trial Examiner.

* * * *

Page 12 of Union brief:

> *"The question asked* [Logan, relating to 500 engineers leaving the employ of Boeing] *presupposes facts contrary to the record."*

The letter sent by the Union to the 2,800 firms states in part "Over 500 engineers, scientists and industrial mathematicians are pledged to attend the Conference" (R. 487). The number mentioned in the question was conservative and had ample basis in the Record. The only limitation placed upon participation in the MAC was that it was to be confined to SPEEA members (R. 37), numbering some 2,100 (R. 35).

* * * *

Page 13 of Union brief:

> "[The number of engineers that left] of course would be under the control of Boeing by seeing to it that its terms of employment were competitive."

The Record contains nothing that would indicate that Boeing was not competitive with others on matters of wages, hours and working conditions and, in fact, clearly indicates a determination on the part of Boeing to remain competitive (R. 429-33). It is a fallacious argument to say that under such circumstances an employer can "control" the damage by increasing wages. Such an argument could be advanced in support of substantially all damaging and unprotected concerted activities, including those situations involving damage resulting from sabotage, sitdown strikes, wildcat strikes, etc.

* * * *

Page 13 of Union brief:

> "The MAC was intended as an expedient less drastic than a strike * * *"

True, from the viewpoint of those promoting the

MAC—they could remain on the payroll until such time as they accepted other employment, thereby suffering no wage loss. Boeing, on the other hand, as the Trial Examiner put it, would probably have suffered damages "far beyond those properly to be anticipated from a strike of reasonable duration" (R. 97). The majority of the Board did not disturb this finding.

* * * *

Page 14 of Union brief:

> "In letters to SPEEA * * * no argument was made that the potential damage to Boeing would outrun a strike; * * *.
>
> "Petitioner's argument in its briefs comes now as afterthought having no basis either in the findings or in any substantial evidence."

The Company's letter written immediately after Pearson's discharge, to which the Trial Txaminer refers (R. 51) clearly mentions the very damaging nature of the MAC program, and the Union warned the Company of the potential damage of the MAC program as early as the fall of 1952, several months prior to Pearson's discharge (R. 419-20).

* * * *

Page 14 of Union brief:

> "Problems Posed for SPEEA by the 'Gentlemen's Agreement,' * * * Afford Independent Justification for SPEEA's Holding the MAC"

As shown above, such contention is directly contrary to the finding of the Trial Examiner (R. 91-4) which in this respect was not disturbed by the Board. The majority opinion is not based on any such contended "justification."

* * * *

Page 15 of Union brief:

> "The Board in a footnote stated that the question whether the MAC in fact restricted employment opportunities is immaterial * * *. We agree, but suggest that the extent to which necessity was presented affords additional, independent, justification for the MAC."

The term "MAC" is believed to have been inadvertently used instead of "Gentlemen's Agreement" in the foregoing statement. If this belief is correct, and the Union agrees that the effect of the Gentlemen's Agreement upon employment is immaterial, it is not clear, even from the Union's standpoint, as to how such "Agreement" can be at the same time regarded as immaterial and urged as a "justification" for the MAC.

* * * *

Page 16 of Union brief:

> "Illustrative letters are in evidence wherein members of the Aircraft Industries Association had refused consideration of employment applications made by SPEEA members * * *."

These letters do no more than follow the usual policy of most employers, particularly those employing professional men. See the remarks of the Trial Examiner in which he recognizes that such policy would probably exist in the absence of a "Gentlemen's Agreement" (R. 91-2). Moreover, as pointed out in the Company reply brief (pages 7-8), the Boeing practice was shown to vary from that of other AIA companies and in no way inhibited *Boeing* employees insofar as contacts with other employers were concerned.

* * * *

Page 16 of Union brief:

> "The 'Gentlemen's Agreement' of the Aircraft Industries Association went so far as to violate the anti-trust laws"

The pertinency of this unfounded observation is not apparent.

* * * *

Page 20 of Union brief:

> "Senator Taft * * * himself recognized that a Union might perform the functions of an employment agency. * * *
>
> " 'If in a few rare instances the *employer* wants to use the Union as an employment agency, he may do so * * *'." (emphasis added)

Senator Taft was not talking about a device designed to expedite and encourage employees to *leave* an employer, to take employment with others, some of whom are competitors.

* * * *

Page 20 of Union brief:

> "The Board and the courts have taken for granted the legality of the Union's operating a hiring hall or employment agency"

See the Company reply brief, page 12, and the remarks of the Trial Examiner (R. 88-9), relating to the attempted hiring hall analogy.

* * * *

Page 21 of Union brief:

> "This very circumstance [Boeing being the only aircraft manufacturer in the Pacific Northwest] renders it necessary for SPEEA to establish and maintain contacts with other aircraft manufacturers * * *. Without such a mechanics as a MAC,

> SPEEA members would be Boeing captives, left to accept such terms as the Company wished."

* * * *

The Record clearly supports the contrary conclusion. See also Company reply brief, page 4.

* * * *

Page 21 of Union brief:

> "Here [in *Metal Mouldings Corporation,* 39 NLRB 107 (1942)] an employee was * * * properly discharged * * *. Wholly lacking was the element of concerted activity authorized or sponsored by a labor union * * *."

Authorization of an activity by a union does not render it "protected." Also it is to be noted that the reference to this case in the Company opening brief is to the decision of the Court of Appeals (CA-6). The reference to the case in the Union brief (39 NLRB 107) is to the Board decision which the Court of Appeals reviewed and refused to enforce. The Board had held that the discharge involved in the case was because of the individual's participation in protected, *concerted,* anion activities. The Court held that the discharge was properly for cause because of the part played by the individual in inducing other employees to leave and go to another employer. We are unable to find in such Board decision the statement attributed to the Board that appears at the top of page 22 of the Union brief. See also Company reply brief, page 13.

* * * *

Page 22 of Union brief:

> " * * * both the Trial Examiner and the Board made explicit findings on this point [the contention that SPEEA was taking steps to induce em-

> ployees to leave Boeing] rejecting Petitioner's contention (R. 44, 75, 137),"

The Record references afford no support for this statement. On the contrary, the uncontroverted evidence in the Record shows that the MAC was devised as a means "to *encourage* engineers to seek more suitable employment elsewhere" (R. 368) (emphasis added).

* * * *

We confess difficulty in following the "constitutional" argument appearing in the Union brief, pages 22-25. Apparently it is urged that the terms "disloyal," "unlawful," "improper," "indefensible" and "illegal" must be discarded in testing the protected or unprotected nature of a concerted activity. Otherwise the Board will be permitted to "legislate" in contravention of the Constitution. The brief does not define exactly where this argument leads but it would appear to indicate that the Board in determining whether an activity is protected must, according to the argument, adhere strictly to the literal application of the language of Section 7 to each case. As pointed out on page 21 of the Company opening brief, this would legitimatize all concerted activity including slowdowns, sitdown strikes, wildcat strikes, disloyalty, refusal to obey rules, etc. It would seem unnecessary to refer again to the numerous decisions that compel rejection of any such argument. The argument fails to consider the general purposes and objectives of the Act and ignores completely the right preserved in the Act to discharge for cause. If the language of the Act permits leeway on the part of the Board and the Courts, such as mentioned in the Union brief, the argument would seem to

involve necessarily the constitutionality of the Act itself, and the Supreme Court has long since put any such question to rest (*N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)). On the contrary, it is urged on behalf of the Company that the language of the Act when read in its entirety permits no such leeway and clearly precludes the Board from reaching any such unfounded decision as is indicated in the majority opinion.

* * * *

The remainder of the Union brief urges certain distinctions and interpretations as to decisions cited and discussed in the briefs previously. We shall not reargue the purport of these decisions here other than to point out certain statements that are in error.

1. On page 26 of the Union brief in discussing the Supreme Court decision in the *Jefferson Standard* (*N.L.R.B. v. Local Union No.* 1229, *International Brotherhood of Electrical Workers* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953)) case it is stated that: "Here the union had been conducting a strike and peaceful picketing when several members embarked upon a frolic of their own, giving rise to the questions presented in the case:" No strike was involved, the employees remained on the payroll and they were not embarked upon "a frolic of their own" because their activity had the approval and sanction of the president and the executive committee of the union (see Board's decision in the case, 94 NLRB No. 227, 28 LRRM 1215 (1951)).

2. On page 27 it is said that the Supreme Court based its result in the *Jefferson Standard* case "on two

grounds: (a) that no activity of the union was presented, and (b) the activity of the individuals was deliberately disassociated from collective bargaining * * *." As mentioned above, the activity had the sanction of the union officials and it was closely associated with collective bargaining, the Supreme Court stating: "the main point of disagreement arose from the union's demand for the renewal of a provision that all discharges from employment be subject to arbitration * * * " etc. As in the case of the *Jefferson Standard* handbills, the letter sent out by SPEEA to 2,800 other firms contained no mention of any Boeing-SPEEA controversy.

3. On page 31 the Union brief disposes of the Supreme Court's decision in *International Union, et al. v. Wisconsin Employment Relations Board, et al.,* 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949), by stating that the decision deals only with a separate question of federal-state jurisdiction. On the contrary in that case the Supreme Court was required to pass squarely upon the question of whether the activities there involved were or were not protected by the federal law.

CONCLUSION

We urge with all possible emphasis that the vital and important principle involved in this case does not turn upon any issue of fact, as the Union urges, but involves instead an issue of law that derives from a factual situation regarded by the Board, the Trial Examiner and the employer as substantially undisputed. The resolution of such issue of law must properly be in the direction of dismissing the complaint for the numerous rea-

sons mentioned in the briefs filed on behalf of the Company and in the minority opinion.

Any other result would require a drastic departure from the primary objective of the Act: to stabilize and engender peaceful employer-union relationships.

Any other determination requiring an employer to refrain from in any way interfering with activities of the type here involved would lead to results that are plainly incongruous and unintended by Congress. It is inconceivable that Congress could have intended to require an employer in the circumstances of this case to remain powerless to terminate employees who are at the time developing and activating such a campaign as the MAC; or to combat or interrupt, impede or interfere in any way with such a campaign; or to replace such employees with applicants who may be willing to work for the employer on the basis of his current wage rates; or to do anything but wait and watch the damage to him develop and progress and then and only then —at a time determined and selected by his employees —do whatever he can to recover from the situation, if that is then possible.

Respectfully submitted,

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No. 14,541

United States Court of Appeals
For the Ninth Circuit

GLEN W. PERSONS,
Appellant,

vs.

GERLINGER CARRIER COMPANY,
a corporation,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Codes and Rules

Treatises and Notes

No. 14,541

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APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal by appellant Glen W. Persons from a judgment on the verdict against him and in favor of appellee Gerlinger Carrier Co. in the United States District Court for the District of Oregon in an action for damages for personal injuries suffered by appellant, a resident of the State of California, as a result of the negligence of appellee, Gerlinger Carrier Co., an Oregon corporation. Jurisdiction of the District Court is based upon the diversity of citizenship and the fact that the amount in controversy ex-

ceeds $3,000.00, exclusive of interest and costs, pursuant to the provisions of 28 *U.S.C.A.* 1332(a)(1). (Complaint, Vol. I, Trans. p. 3; Answer, Vol. I, Trans. p. 8-9; Pre-Trial Order, Vol. I, Trans. p. 26.)

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon the foregoing facts, Notice of Appeal (Vol. I, Trans. p. 39) and the provisions of 28 *U.S.C.A.* 1291, and Rule 30 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This is an action for damages for personal injuries suffered by appellant as the result of negligence of appellee. Appellee is a manufacturer of fork lift trucks used in factories and lumber yards for handling bulk products. In September, 1952, appellee sold one of its fork lift trucks to one Philbrook for the lumber mill business of appellant's employer at Philo, California. (Vol. I, Trans. pp. 26, 27.) The Gerlinger carrier was loaded onto Philbrook's truck at the factory in Oregon by appellee with the front boom assembly detached so that when it was unloaded the motor section would be driven off under its own power and the fork lift assembly would be unloaded separately with a crane or other machine. (Vol. II, Trans. pp. 13-26.) Philbrook transported the Gerlinger carrier to Philo, California, and on September 9, 1952, appellant proceeded to drive the carrier down a ramp or incline off the Philbrook truck with the

boom detached. The carrier suddenly turned over and fell on appellant crushing his pelvis, left hip, spine, damaging his left kidney, puncturing his bladder and damaging the nerves in the pelvic area all resulting in permanent injuries to his general damage in the sum of $200,000.00. A duly licensed consulting engineer computed the dynamics of the carrier involved in the accident and found it to be unstable and dangerous to operate with the fork lift detached and at the trial testimony established that the carrier involved in the accident was of the same design as had been produced by appellee for several years.

The specifications of negligence of appellee upon which the case went to trial are stated in the pretrial order (Vol. I, Trans. pp. 29-30) and we summarize them as (1) failure to warn the purchaser to assemble the Gerlinger carrier before operating it, and (2) failure to mark an instruction plate in the cab of the Gerlinger carrier warning against operating it with the boom assembly detached; though appellee under both (1) and (2) knew or should have known that it was unstable and extra-hazardous and was likely to overturn if operated with the boom assembly detached and that this condition would not be apparent to persons who could reasonably be expected to unload it; (3) placing on the market and selling a fork lift truck inherently dangerous and extra-hazardous due to basic instability when appellee knew or should have known it would be operated by persons such as appellee under the circumstances and conditions in this case.

Errors upon which this appeal is based are summarized in the Specification of Errors and are not stated here to avoid unnecessary repetition. The errors complained of are (1) In refusing to allow discovery, (2) In admitting testimony, and (3) Improper remarks by the Court during the trial and in the instructions to the jury.

QUESTIONS PRESENTED.

1. Whether the District Court properly denied appellant the right of discovery concerning evidence of other prior accidents and engineering knowledge in possession of appellee going to the inherently dangerous characteristics of appellee's carrier when operated with fork lift boom removed. And further whether appellee's objection to the interrogatories was too late.

2. Whether testimony of the absence of prior accidents and existence of prior accidents under the conditions not shown to be identical or similar in all significant factors is admissible.

3. Whether the question asking if the witness had ever known of any previous accidents, regardless of conditions and circumstances, and also testimony of what others had told him concerning such previous accidents, is admissible.

4. Whether opinion testimony, based upon experience with other types and makes of machinery, that there were no unusual dangers in operating the particular machinery, is admissible.

5. Whether questions leading and suggestive in nature on direct examination were proper.

6. Whether a witness is qualified as an expert by experience with other types and makes of machinery to testify as to the effect, if any, upon stability of changes in the design of the particular machine.

7. Whether opinion testimony that the particular machine, different from others that had passed tests for particular purposes, would also pass the same tests, was admissible.

8. Whether testimony that no warning was given concerning possible dangers in operating other makes and types of carriers was admissible as to the particular machine in question was admissible.

9. Whether a person familiar with other types and makes of machinery may be permitted to answer hypothetical questions upon the operational characteristics of the particular machine under the particular circumstances.

10. Whether the trial court so intermingled its comments upon the evidence with its instructions of law to the jury that the instructions were prejudicially confusing and misleading.

11. Whether the failure of the trial court to instruct the jury upon each issue of negligence raised was error.

12. Whether the failure of the trial Court to give each or any of the instructions proposed by appellant was error.

13. Whether the instructions to the jury were so palpably erroneous that the Court of Appeals will review them on its own motion.

SPECIFICATION OF ERRORS.

The District Court erred in:

1. Sustaining appellee's objections to appellant's Interrogatories filed June 16, 1954 (Vol. I, Trans. pp. 16-20, 24-25) which prevented appellant from obtaining sufficient information to prepare for trial concerning the dynamic and static weight and balance characteristics, dimensions of various parts, and capacity of the Gerlinger Carrier involved and information of previous accidents, officers of appellee having knowledge of previous accidents and designing and manufacturing the Gerlinger carrier concerned, and statistical information on the number produced, years in which produced, sales, prices and sums spent on engineering and design.

2. Admitting testimony of Victor O. Williams who handled finances as an executive vice-president and general manager of appellee (Vol. II, Trans. pp. 39-40), that he had never received a complaint concerning instability, and that he had never heard of a Gerlinger fork lift truck tipping over while being unloaded and loaded where the fieneral practice was to ship them with the boom assembly detached (Vol. II, Trans. p. 53) over the objection that it was irrelevant.

3. Admitting testimony of appellee's witness Gohrke that no previous accident where a Gerlinger

fork lift truck had tipped over had come to the witness's personal knowledge but that he had heard of one tipping over with the boom assembly attached under circumstances other than were involved in this case, over the objections that it was hearsay, and a further objection that what happened in another situation was immaterial, irrelevant and incompetent. (Vol. II, Trans. p. 186-187.)

4. Admitting testimony of appellee's witness Robert Blacketer on direct examination, where the witness was an operator of a lumber remanufacturing plant using lift trucks of other makes, and in which the witness was asked and he testified that in his opinion there was no unusual danger in operating a Gerlinger fork lift truck over the objection that his opinion was immaterial and based upon machinery of other makes and types than was involved in this case. (Vol. II, Trans. pp. 164-166.)

5. Admitting further testimony of witness Blacketer on direct examination giving yes and no answers to questions over the objections stated in the preceding specification and also that the questions were leading and suggestive, concerning the effect of adding, subtracting, and relocating weights and parts of the mechanism of the Gerlinger carrier affecting its stability. (Vol. II, Trans. pp. 166-167.)

6. Admitting testimony of appellee's witness Harry A. Herzog, as an expert having experience in operating different kinds of fork lift trucks in lumber operations, that in his opinion (1) shifting side shifter mechanism or (2) adding 1000 pounds to a different

location on the Gerlinger carrier would make no difference in its stability, over the objections that the witness had no experience or knowledge qualifying him as an expert concerning the Gerlinger carrier involved in this action. (Vol. II, Trans. pp. 172-173.)

7. Admitting testimony of Ray W. Gohrke, assistant manager of appellee (Vol. II, Trans. p. 183), that in his opinion a difference of 1500 pounds between the Gerlinger carrier that fell on appellant and the fork lift trucks involved in U. S. Navy Compliance tests would make no difference as to whether the Gerlinger carrier involved would pass the Navy tests, over the objection that the opinion had no sufficient foundation in data and facts susceptible of proof as distinguished from a layman's observation. (Vol. II, Trans. p. 183.)

8. Admitting testimony of appellee's witness Glenn Herz that no warning placards or notices were placed on Hyster or Ross makes of fork lift trucks or carriers when shipped to the purchaser to warn of any instability or danger in operating the trucks with the boom assembly detached, over the objection that there was no relationship whatsoever between such other makes of trucks and the Gerlinger carrier in this case (testimony irrelevant, immaterial, and incompetent), and, further, in overruling appellant's motion to strike the testimony. (Vol. II, Trans. pp. 200.)

9. Admitting testimony of appellee's witness Glenn Herz answering hypothetical questions that under the circumstances of the case and, apparently based upon his knowledge of other types of fork lift trucks, the

Gerlinger carrier would tip over with a combination of excess speed and sharp turning, over the same objection as in the foregoing specification 8. (Vol. II, Trans. pp. 200-202.)

10. Admitting testimony of appellee's witness, Lloyd H. Peterson, concerning tests of Gerlinger fork lift trucks, of types and kinds not shown to be the same as the Gerlinger carrier herein concerned, for lateral and longitudinal stability over the objections that the testimony was immaterial, irrelevant and incompetent, and, further in overruling a motion to strike the same, and in the same line of questioning, that the testimony was hearsay. (Vol. II, Trans. pp. 207-208.)

11. Failing to distinguish between comments upon the evidence and instructions of law in giving instructions to the jury. The charge to the jury, in its entirety was as follows:

(Vol. II, Trans. pp. 235-240.)

"Court's Instructions to the Jury.

The Court: Ladies and Gentlemen, in trials like this it is the function of the jury to pass on disputed questions of fact and the function of the Court is to present to the jury the law that applies to the case; but many times we get cases where the facts and the law do not intertwine and it becomes necessary for the Court to make some comment on the facts for the sake of clarity.

I was not sure when we began this case, and I don't know now that I can make a satisfactory clear statement of just what the claim is against

the defendant, as to what duty it had, as a matter of law, towards this unfortunate man and wherein it violated that duty.

The defendant, like a number of its competitors in its field in this great lumber industry here, was engaged in the making of a piece of heavy machinery that has been widely distributed over a long period of years.

It was built to carry loads, with a boom as an essential part of the load-carrying operation. It was not built to be operated with the boom off and without a load, the way it was being operated at the time this accident occurred.

I do not see much to this engineering talk on both sides about the center of gravity and the like. We are not dealing here with an accident that occurred when the machine was being used, at the time, for the purposes for which it was built. We are dealing with an accident that occurred under unusual circumstances, and, just in connection with the unloading of it, it had to be disassembled to load it and to unload it.

It may be true—I don't know; that is a question for you to pass on in this case. It may be true that when the boom was taken off, as was necessary to unload it, that it lost some of its balance that otherwise it would have had, but how are you going to avoid that? It had to be built with reference to its primary use when it was carrying loads.

A very narrow question in this case is whether, under these exceptional and infrequent circumstances, when the machine was being operated and unloaded, there might have been some extra caution needed to avoid any imbalance which re-

sulted from the boom being off. I don't say that there was any imbalance. There is testimony here to the effect that the balance was very little affected when the boom was off, but that is a question, as I say, for your consideration.

The question here, and the only question, is whether there should have been some warning given with regard to these particular and exceptional occasions when the machine was being used in loading and unloading, that some extra care perhaps should be taken in handling it. That is the only question in this case.

We are not trying here at all—I am not trying and you are not trying the engineering features of this machine, as a general proposition. If you think, in view of plaintiff's charge of negligence —and that is the only negligence you are entitled to consider—there was fault and was negligence on the part of the defendant in not posting some warning where it would be obvious to anybody handling it in loading and unloading, that there was some unusual risk involved as to balance, that is the substance of what you should consider here.

Negligence has to do with reason, and a man is negligent when he does something that an average person, under the same or similar circumstances, would not have done, or when he fails to do something that, under the same circumstances, the average reasonable person would have done, and that is the only question here for your consideration: Did this manufacturer, in view of its experience over a long period of time in the distribution of a great number of these machines, never having had an accident of this sort reported to it, in view of its own knowledge about its own machine, considering also its duty to the public—

whether this defendant was in that respect negligent; in other words, did it fail to do something that an average reasonable manufacturer, under similar circumstances, would have done, namely, putting some notice in this machine saying, in effect, that 'This is a special and unusual situation which arises at the time of loading and unloading of the machine,' something about being extra careful, or something along that line.

Plaintiff has the burden of satisfying you, like the plaintiff in every case, that the defendant was negligent, that it did fail to do what the average reasonable manufacturer would have done, that is, that the average reasonable manufacturer would have given such notice.

If the plaintiff has satisfied you that was so and that in that respect the defendant failed in its duty to the public and that that caused the accident to the plaintiff, then the plaintiff is entitled to a verdict. If you are not so satisfied, the verdict should be for the defendant.

There not only must be negligence alleged and proved that it was improper conduct of the defendant, but that it must have been the proximate cause of the accident. That means the direct cause.

The defendant's idea is that the cause of the accident was this unfortunate man's own conduct under the circumstances, and that he was guilty of contributory negligence with respect to how the accident happened.

The law as to that is, even though the defendant, in this case the manufacturer, was negligent as charged, if the plaintiff himself contributed to the accident by his negligence, meaning again failure

to act as an average reasonable person would under similar circumstances, he may not recover. That would be the rule in this case. The burden as to contributory negligence is on the defendant.

If you feel the plaintiff is entitled to recover you should award him such compensation as will fully and fairly compensate him for pain and suffering in the past, as well as that which he may be reasonably certain to suffer in the future, plus out-of-pocket expenses, such as doctor and hospital expenses, incurred in the past and reasonably certain to occur in the future; as well as loss of earnings in the past and loss of earnings which may reasonably be expected to occur in the future, to the extent that might be reasonable, reasonably expected to occur.

Your verdict must not be based on sympathy or prejudice.

If, after applying the law, you find this defendant, the manufacturer, is not liable for what occurred here, your duty will be plain; you will find for the defendant. On the other hand, if you find the defendant was negligent and had caused the accident and that there had not been contributory negligence, your duty will be likewise plain; your verdict will be for the plaintiff.

You will take the exhibits with you to the jury room and give them the weight you feel that they are entitled to, along with the form of verdict. You will elect a foreman on retiring. Your verdict must be unanimous. You will be furnished with two forms of verdict, which are self-explanatory.

Swear the Bailiff.

(Bailiff sworn.)

The Court: I have discussed the facts which I think necessary for purposes of clarity, but I want to say to you this one thing: You are the exclusive judges of the credibility of the witnesses and of the weight and value of the testimony. If I have made any expressions as to any view that I entertain of disputed questions of fact or given you that impression, you are free to disregard such expressions.

You may retire."

12. Failing to instruct the jury upon each of the issues of negligence raised in the pleadings and pretrial order, and in limiting its instruction upon liability to a question of whether appellee should have given warning of a dangerous condition under the circumstances. (Vol. I Trans., p. 39-40; Vol. II, Trans., pp. 235-240, as copied in Specification 11, above.)

13. Failing to give each of plaintiff's proposed instructions numbered 3, 4, 5, 6, 7, 8, and 9. (Vol. III, Trans; Vol. II, Trans. pp. 235-240, instructions given copied under Specification 11, above.)

SUMMARY OF ARGUMENT.

I. The District Court improperly denied appellant his right of discovery concerning evidence of prior accidents and engineering knowledge and information in possession of appellee going to the inherently dangerous characteristics of appellee's carrier when operated with fork lift boom removed.

A. The objections to interrogatories were filed too late for the Court to act upon them.

B. Appellee's objections, if timely, were invalid.

II. Testimony that the witness had never heard of a prior accident is inadmissible.

Such testimony is hearsay, and has no probative value.

Hearsay so affects the fundamental rights of the parties in this action that it is a matter of substance rather than procedure; the law of California and not Oregon should apply.

III. Evidence tending to show the absence of other accidents, or injuries is inadmissible where the place, method, or appliance in question is not shown to have received the same use as that given it by plaintiff, or when the place, method, or appliance in question is in itself negligent or dangerous.

IV. The instructions of the District Court to the jury consisted of an admixture of comment on facts and erroneous instructions of law confusing and misleading such that the Court of Appeals may review them upon its own motion.

A. The Court of Appeals may on its own motion review patent errors in instructions to the jury, notwithstanding failure of appellant to make specific objections pursuant to Rule 51 of the Federal Rules of Civil Procedure.

B. The instructions in this case are patently erroneous.

Prejudicial comment of judge that it was uncertain what appellant's case was.

Comments on evidence and erroneous instruction to disregard the only competent evidence in the trial upon the subject of the dangerous and unstable characteristics of appellee's product were not justified.

The instructions ignored one of appellant's principal charges of negligence and gave erroneous instructions upon other charges of negligence.

The instructions failed to charge that contributory negligence is not a defense unless it is a proximate cause of the event.

There was no competent evidence upon which to allow the defense of contributory negligence to go to the jury.

V. Opinion testimony based upon experience of the witness with other types and makes of machinery and not shown to be based upon the particular type and make of machine in the present case is inadmissible.

A. Opinion not admissible where no experience with the same type of machine as involved in case was shown.

B. Opinion testimony concerning the effect of relocating a part of the mechanism or adding weight without qualifying the witness as an expert in such matters was inadmissible.

VI. Error once shown is presumptively prejudicial unless absence of prejudice shows from the entire record on appeal.

ARGUMENT.

I.

THE DISTRICT COURT IMPROPERLY DENIED APPELLANT ITS RIGHT OF DISCOVERY CONCERNING EVIDENCE OF PRIOR ACCIDENTS AND ENGINEERING KNOWLEDGE AND INFORMATION IN POSSESSION OF APPELLEE GOING TO THE INHERENTLY DANGEROUS CHARACTERISTICS OF APPELLEE'S CARRIER WHEN OPERATED WITH FORK LIFT BOOM REMOVED.

Appellant filed a set of interrogatories on June 16, 1954, (Vol. I, T. 16-20) to obtain appellee's information and knowledge of prior accidents and engineering data, and a motion for production of documents on June 22, 1954. Appellee filed objections to the interrogatories on June 29, 1954. (Vol. I, T. 24.)

A. The objections to interrogatories were filed too late for the Court to act upon them.

Rule 33 of the Federal Rules of Civil Procedure read in part:

> "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. * * * Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined. * * *"

The objections were filed late but were nevertheless sustained.

B. Appellee's objections to the interrogatories of June 16, 1954, if timely, were invalid.

Appellee did not object to particular questions in the interrogatories; his objections sustained by the order of July 12, 1954 (Vol. I, T. 25) were general, that is, (1) existence of prior depositions of appellee's president and shop foreman, (2) prior interrogatories, (3) interrogatories unreasonable in their extent and nature, and (4) interrogatories not served within a reasonable time after commencement of the action and within a reasonable time prior to trial.

A statement of principles governing the discovery process generally appears in *Hickman v. Taylor,* 329 U.S. 495, 91 L. ed. 451, 67 S. Ct. 385, where the Supreme Court said:

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior Federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those

> issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

and

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his oppenent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

The fact that prior depositions may have been taken is of no consequence; there is no claim that the information had already been obtained in those depositions. The first interrogatories of appellant (Vol. I, T. 10-11) involved other information and questions*.

The requirement, as a matter of social philosophy, that the manufacturers of industrial machinery employ ordinary safety methods including the determination of tipping characteristics in machinery propelled across the surface of the ground, is so soundly estab-

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*Three year delay did not bar motion to produce documents. (*Farr v. Delaware, L. & W. R. Co.*, 7 F.R.D. 494.) That defendants had been previously examined on subjects and that state court had ruled adversely on substantially same matter did not bar motion to produce. (*Republic of Italy v. De Angelis*, 14 F.R.D. 519.)

lished in our democracy of this twentieth century that it does not permit of argument. We do not know to this day whether the appellee employed a qualified engineer to analyze the dynamic stability of the machine which crushed appellant, maiming him for life, or whether the design was merely the outgrowth of amateur trial and error. It is suggested that, for the purpose of considering whether appellant had a fair trial, the omission by the appellee to produce scientific information constitutes an admission that none was available. Without discovery of the facts which go to the very essence of the cause of action, how could appellant receive justice under the trial Court's attitude, reflected by his ruling on the interrogatories and the motion to produce documents for inspection, under Rules 33 and 34.

II.

TESTIMONY THAT THE WITNESS HAD NEVER HEARD OF A PRIOR ACCIDENT IS INADMISSIBLE.

Appellant called Victor O. Williams, executive vice-president and general manager handling finances for appellee, and he was asked the following questions after testimony that it was always the policy to ship Gerlinger fork lift trucks with the boom assembly detached: (Vol. II, T. 53.)

> "Q. In the time Gerlinger has been manufacturing these fork lift trucks has there ever been a case of one tipping over while being unloaded or loaded?
>
> A. Not to my knowledge.

Q. In these years during which you have been making them has there ever been a complaint, either in Court or to the Gerlinger Carrier Co., as to the stability of this fork lift truck when being loaded or unloaded or any other time?

A. No.

Mr. Beatty. Objection as irrelevant.

The Court. Objection overruled.

A. No, sir.

Mr. Cosgrave. Q. What is your answer?

A. I said No, we have had no complaints.

Q. Do you know of any case where the load has ever tipped in any direction at all?

A. I heard of one.

Q. Do you know what one that was?

A. That was at Merced, California, and the lift truck, the fork lift truck, then was empty and the driver was racing across the yard. That is what was told to me—the driver was racing across the yard and he hit a depression and he lost control of the lift truck and turned over.

Q. Have you ever had a case where a loaded one tipped? Do you remember any cases?

A. Not to my knowledge."

The above line of questioning has all the vices stringently criticized in *First National Bank v. Stewart,* 114 U.S. 224, 29 L. ed. 101, 5 S. Ct. 45, where the bank teller was asked "Had you any information, from any source, of any money being received at the Bank, or on or about the Wednesday preceding the McMillan's death?" The offer of proof showed a negative answer was anticipated. The Supreme Court sustained the action of the trial Court in sustaining an objec-

tion to the question with comments applicable to the case at bar.

> "The inadmissibility of both the question and the answer, had the answer been given, is obvious. The answer called for the information which from any source might be in the possession of the witness, and not for his knowledge. An answer detailing the hearsay statements of others, whether verbal or in writing, made at any time and place, would have been responsive. The objection to the question was well taken, and the Court was right in excluding it. * * * A negative answer would have been too vague and conjectural to be admitted as evidence. It did not appear that many payments of money have been made to the Bank without knowledge of the witness. It was not shown what his duties were, whether to receive or to pay out money."

It was not shown that the witness Williams would have necessarily had knowledge of prior accidents. The testimony shows on its face that it is based solely upon hearsay reports related to him by others who may or may not have had personal knowledge of the events; there could have been many of which he had no knowledge. The testimony has no probative value and was, therefore, entirely irrelevant, as well as incompetent and immaterial.

Appellee's witness, Ray W. Gohrke, assistant manager of appellee, was asked questions and answered over objections. (Vol. II, T. pp. 186-187.)

> "Q. Mr. Gohrke, has there ever come to your attention, in your capacity at Gerlinger Carrier

Co., any incident other than the one involved in this case, of Gerlinger lift trucks tipping?

A. Not to my direct knowledge, No.

Q. Well, have you ever heard of any tipping?

A. One without a boom on it, No.

Q. Did you ever hear of one with a boom on tipping?

A. Oh, yes.

Q. Could you tell us what the particular circumstances were, as you understood them?

Mr. Dilley. That is purely hearsay. Objection is made on that basis.

The Court. He may answer.

Mr. Cosgrave. Q. Would you answer, please?

A. In one particular case—I don't remember the name of the plant, but I do know that it tipped over because they had a load up too high on it, and I rather think it tried to dump the load. There was something—I think there was another one that I know of tipped sideways because one of the wheels broke through the dock. Those are the only two I recall.

Q. I will ask you this, whether those are the only instances you know of in your 30 years' experience with Gerlinger Carrier Co.?

A. Yes.

Mr. Dilley. Objection is made, your Honor, on the basis that what happened in another situation is immaterial and irrelevant, as well as incompetent, with regard to what occurred to the machine in this case and in the conduct of the vehicles in this case.

The Court. Overruled.

Mr. Cosgrave. Q. Would you answer that, if those are the only cases of which you know?

A. That is right."

The same argument applies to this line of testimony.

It is well established that hearsay evidence, unless of a kind and character admitted under a generally recognized exception, is inadmissible. *Wigmore on Evidence* (Third Edition) section 1360, et seq., traces the development of the hearsay rule over the centuries. It is an essential part of the process of finding the truth in a dispute. Its gravamen is the accessibility of the declarant for cross-examination; fundamental rights of the parties to a fair trial depend upon enforcement of the hearsay rule to the extent that it has the characteristic of a substantive rule rather than a matter of procedure.

It is established that the law of the place of injury controls substantial rights where a negligent act in one state has harmful consequences in another state. *Vancouver S. S. Co. v. Rice,* 288 U. S. 445, 77 L. ed. 885, 53 S. Ct. 420, affirming C.C.A., *The City of Vancouver,* 60 F. 2d 793, cert. granted *Vancouver S.S. Co. v. Rice,* 287 U. S. 593, 77 L. ed. 417, 53 S. Ct. 220, a case which came up from Oregon and held that the place of death and not the place in which the injury causing death governed. See also: 15 C. J. S. pp. 899-900, "Conflict of Laws," sec. 12(2), *"Lex Loci Delicti."*

It is further stated in 65 C.J.S. p. 859: "It has been held however, that conclusions to be drawn from the evidence in determining whether or not a jury case has been made must be determined by the law of the place where the accident involved occurred; and,

where the evidential matters affect the right of action and do not relate merely to practice or procedure in the enforcement of the right, the lex loci delicti controls."

Thus, where substantial rights are directly controlled by what procedural rule would otherwise be followed, the law of California applies as the place of injury.

The law of California clearly excludes the evidence above quoted. *Murphy v. Lake County,* 106 C.A. 2d 61, 234 P. 2d 712; *Giddings v. Superior Oil Co.,* 106 C.A. 2d 607, 235 P. 2d 843.

The rapidity of the questions and answers given followed by the summary ruling of the Court upon the objection demonstrates the reason why all of these arguments were not advanced at trial; there was no opportunity allowed.

III.

EVIDENCE TENDING TO SHOW THE ABSENCE OF OTHER ACCIDENTS, OR INJURIES IS INADMISSIBLE WHERE THE PLACE, METHOD, OR APPLIANCE IN QUESTION IS NOT SHOWN TO HAVE RECEIVED THE SAME USE AS THAT GIVEN IT BY PLAINTIFF, OR WHEN THE PLACE, METHOD, OR APPLIANCE IN QUESTION IS IN ITSELF NEGLIGENT OR DANGEROUS.

The law as here stated appears in 65 C.J.S. at page 1057. It applies to the above cited testimony concerning other accidents. That testimony is harmful under the circumstances of this trial because it inferred to the jury that the Gerlinger fork lift truck would not

turn over unless operated under the circumstances of other accidents, based upon rumor and reports to the witnesses from unknown sources.

The inadmissible character of the testimony is further demonstrated by the negligence cases of *Denver City Tramway Co. v. Hills,* 50 Colo. 326, 116 P. 125, 126 L.R.A. N.S. 213, where defendant's claims agent handling all reports of accidents for the company for many years was not permitted to testify he had never received a report of an accident similar to the case in trial, and *Blackwell v. J. J. Newberry Co.* (Mo. App.) 156 S.W. 2d 14, to the same effect with further observation of the deprivation of opportunity for cross-examination.

IV.

THE INSTRUCTIONS OF THE DISTRICT COURT TO THE JURY CONSISTED OF AN ADMIXTURE OF COMMENT ON FACTS AND ERRONEOUS INSTRUCTIONS OF LAW CONFUSING AND MISLEADING SUCH THAT THE COURT OF APPEALS MAY REVIEW THEM UPON ITS OWN MOTION.

A. The Court of Appeals may on its own motion review patent errors in instructions to the jury, notwithstanding failure of appellant to make specific objections pursuant to Rule 51 of the Federal Rules of Civil Procedure.

This rule is designed to promote due administration of justice and avoid the disastrous consequences of a technical failure to object. A leading decision is *Hormel v. Helvering,* 312 U.S. 552, 557, 61 S.Ct. 719, 721, 86 L.ed. 1037, on certiorari to review a judgment setting aside a deficiency assessment of income tax on income from family trusts. The *Hormel* case, supra,

was followed in *Shimabukuro v. Nagayama,* 140 F.2d 13, 15, and in *Dowell, Inc. v. Jowers,* 166 F.2d 214, 220-221, 2 A.L.R. 2d 442, a wrongful death action where the instruction to the jury and comment of the Court of Appeals was:

> " 'I might say this, if you reach the question of an amount, the law of the State of Louisiana applies and this is not to control you but I might indicate to you that in cases in Louisiana of somewhat similar character—some $10,000 or $15,000 say, I do not say that it is too low, but it has been allowed; you have in this case the wife and her individual case of her own, and each of the three children. You have a case here just as if you had four people to deal with instead of one person, each one of whom is entitled to a separate consideration.' "

After noting the failure of counsel to object to the instruction quoted and holding it to have been prejudicial error, the Court of Appeals stated:

> "Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, provides that no party may assign as error the giving or failure to give an instruction unless he distinctly presents to the trial Court his ground for objection. * * * The Court's right in a proper case to consider on its own motion errors patent upon the face of the record where no objection was made, was considered by the United States Court of Appeals for the District of Columbia in Shimabukuro v. Nagayama, 1944, 140 F.2d 13, 15. We find ourselves in thorough accord with the decision in that case."

The Court of Appeals continued by quoting from the *Hormel* case:

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. Mr. Justice Black has recently said: 'There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.' "

The error in the *Shimabukuro* case, *supra,* consisted of instructions inviting the jury to guess and compromise by accepting and rejecting at random items scattered on nine pages, without considering the authenticity of the exhibits as a whole, to determine the amount, if anything, owed by defendant to plaintiff for money advanced.

The same result was reached in *Union Pacific R. Co. v. Owens,* 142 F.2d 145, by the United States Court of Appeals for the Ninth Circuit, without reliance upon any other cases as precedent for its action in reviewing instructions on its own motion, where it was considered that the meaning of Rule 51 had been satisfied by objections to evidence upon which the erroneous instructions appeared to have been predicated in the course of trial.

The error in *Harlem Taxicab Ass'n v. Nemesh,* 191 F.2d 459, was in stating a presumption of fact as a

conclusive presumption of law, and since the parties had raised objections to testimony during the course of trial upon which any presumption might be based, it was stated that the spirit of Rule 51 had been observed and reviewed the instructions on its own motion.

B. The instructions in this case are patently erroneous.

The instructions to the jury are quoted in full in the specifications of errors and are not repeated here. The opening paragraphs that the judge did not know whether he could "make a satisfactory clear statement of just what the claim is against the defendant, as to what duty it had, as a matter of law, towards this unfortunate man and wherein it violated that duty."

There was a pretrial conference and the parties submitted proposed instructions of law setting forth their views of law of liability and the duty owed by the manufacturer. The pretrial order (Vol. I, T. 29-30) shows the contentions upon which trial was had.*
The law of the case was known to the Court.

A most grievous error was the destruction of vital proof for appellant's case. Plaintiff's case was based upon the manufacturer's negligence in manufacturing

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*The proposed instructions of the parties were not in the file according to information reaching counsel for appellant when the record was certified to this Court. Since discovery of that fact, counsel have been attempting to obtain them and place them in the record by cooperating with the request of the trial Court to stipulate to the existence of such instructions and have copies certified to the Court of Appeals for the record. This was not completed at the time this brief is prepared.

an inherently dangerous instrumentality and in failing to provide a warning to persons likely to be injured by operating it.

Mr. Arthur M. James, a consulting and practical engineer with specific experience in computing the factors involved in designing machinery of the type involved in this case established that the machine was inherently dangerous when operated without the boom and fork lift assembly. (Vol. II, T. pp. 114-155.) No real attempt was made by the defense to produce similar evidence other than the generalities stated by persons without engineering background, and where one person claimed an engineering background, no analysis of important factors was shown. (Vol. II, T p. 195, et seq.)

Mr. James gave the only genuine analysis and opinion of the unstable and dangerous characteristics of the Gerlinger fork lift truck involved under the circumstances of the case. This error was foreshadowed by the comments of the trial judge in the absence of the jury when appellant's attorney was objecting to the use of a motion picture film without first providing appellant's expert witness to study the film and advise so that appellant could be properly prepared to object to exhibition of parts not germane to the issues or rebut any inferences it might raise. (Vol. II, T. pp. 159-160.)

> "The Court. I can assure you of one thing right now. Engineers are not going to decide this case. If I ever talk to the jury about this, I am going to talk to them as ordinary people. You can-

> not take hours and days on a lot of stuff about static and all that kind of business. You are privileged, of course, to do that, but the case will turn, as far as I am concerned, and I think as far as the jury is concerned, upon much more practical considerations. You may show the film, but let's get along with our work. Bring the jury down."

This marked the turning point in the trial. It is not known to counsel whether any of the many spectators were friends, associates, or relatives having access to the jurors. The intention of the Court was carried into effect by its several rulings permitting testimony attacked elsewhere in this brief.

Destruction of appellant's expert proof was completed by the trial Court instructing the jury and (1) praising the "great lumber industry" of the state, (2) greatly emphasizing unusual circumstances, notwithstanding appellee's proof that shipment of fork lift trucks under the circumstances of this case was the usual course of business of appellee (Vol. II, T. 52-53), (3) negativing the idea of imbalance, (4) directing the jury at different points and commenting "I do not see much to this engineering talk on both sides about the center of gravity and the like," and "You are not trying the engineering features of this machine as a general proposition," (5) and stating that the only question was whether there was negligence in failing to give warning that there was some unusual risk as to balance in handling the Gerlinger Carrier.

A jury following these instructions could do nothing but ignore the extensive testimony of Mr. James. His qualifications as a consulting engineer competent to testify concerning the static and dynamic stability of the Gerlinger carrier concerned, and its dangerous condition, was never challenged. The only objection to any of his testimony was that part stating that a slight change of design in 1949 had no significant effect upon stability under the circumstances of the case. (Vol. II, T. pp. 129-130.)

Comment of the Court that there was no way to avoid imbalance if the machine were driven with the boom off, as could be expected, before the machine was put to its intended use was followed by the confusing statement "I don't say there was any imbalance. There is testimony here to the effect that the balance was very little affected when the boom was off, but that is a question, as I say, for your consideration." (Vol. II, T. 236-237.)

Next the Court stated that the sole question was whether some kind of warning should have been given under the circumstances of the case, and ignored the theory of negligence predicated upon *MacPherson v. Buick,* 217 N.Y.S. 382, 111 N.E. 1050, L.R.A. 1916F, 696, *Kalash v. L. A. Ladder Co.,* 1 Cal. 2d 229, 34 P. 2d 481, a defective ladder, and *Owen v. Rheem Mfg. Co.,* 83 C.A.2d 42, 187 P.2d 785, defectively loaded railroad freight car, and *Hale v. Depaoli,* 33 Cal.2d 228, 201 P.2d 1, defectively constructed porch resulting in injuries a decade after construction. These cases show a manufacturer is liable if he places a product

on the market reasonably certain to place life and limb in peril if negligently prepared or constructed, as distinct from the negligence in failure to warn of a known dangerous condition. (Vol. II, T 237-238.) The Court mixed its instruction concerning notice with comments upon the long experience of appellee in the business, the absence of prior accidents, which was based upon the irrelevant and incompetent testimony previously discussed in this brief.

The danger of mixing comments on fact and statements of law without careful distinction was a subject of the appeal in *Lynch v. Oregon Lumber Co.,* 108 F.2d 282, as grounds for reversal.

It was stated in *Quercia v. United States,* 289 U.S. 466, 470, ... S.Ct. ....., 77 L.ed. 1321, 1325, that:

> "This privilege of the judge of comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but *he may not either distort it or add to it.* His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. *The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'* " (Emphasis supplied.)

The Court further instructed to the effect that appellee's negligence, if any, must be a proximate cause

of injury, but there was no instruction that contributory negligence of appellant, if any, must be a proximate cause. (Vol. II, T 238-240.)

It was error to instruct on the subject of contributory negligence at all. The substance of testimony having a direct bearing on contributory negligence was:

(a) Appellee's exhibit A, a statement dated 11/20/52, containing a sentence "I was told by one of the fellows later that there was a washout in the road and when one of the back wheels hit that rut, that is what caused the lift to tip over." (Vol. II, T 36.)

(b) Hearsay testimony by appellee's executive, Williams, (Vol. II, T 53-54) relating a prior instance of an accident due to racing the fork lift truck.

(c) Hearsay testimony of appellee's employee, Gohrke, (Vol. II, T 186-187) of prior accidents under other conditions of excessive speeds and overloading the fork lift truck.

(d) Opinion testimony of appellee's employee, Akers, (Vol. II, T 68-69) that the fork lift truck would tip over if the wheels were suddenly turned at a sharp angle while driving at an excessive speed, where the witness relied upon the engineering department to check and determine safety factors (Vol. II, T 71).

(e) Positive testimony of appellant's witness Philbrook that the appellant was driving the fork lift truck at a slow and safe speed as against a statement, Appellee's exhibit B, containing the sentence "I imagine that the reason the lift tipped over when it hit

the chuckhole was because the boom was not on the lift and he may have been going a little fast and was going to put the brake on and when he did that kind of helped to overbalance the lift." (Vol. II, T 83, 89, 91.)

(f) Appellee's witness Blacketer, not an engineer, and not shown to have had experience with the model of Gerlinger fork lift truck involved, gave testimony to the effect that the larger carriers, not shown to mean a Gerlinger fork lift truck, are heavy pieces of machinery and a person can get hurt if they are not careful. (Vol. II, T 165.)

(g) Opinion testimony of appellee's witness, Herzog, that under the circumstances of this case the only cause of tipping over would be high speed and turning though the witness was not shown to have had experience with the model of Gerlinger carrier involved and not shown to have had any technical training or experience to justify giving an opinion concerning this Gerlinger carrier. (Vol. II, T 174-175.)

(h) Opinion testimony by appellee's witness, Herz, an engineer for another manufacturer of carriers that there is danger in operating a carrier over uneven ground if handled improperly (Vol. II, T 198), and testimony of appellee's employee and witness, Krause, on cross-examination to the effect that the Gerlinger carrier of the type involved here would go a maximum speed of three miles per hour in reverse down a six degree incline (Vol. II, T 230-231).

Appellants have searched the record in vain for any affirmative proof of high speed, sudden turning or

braking of the machine by appellant when he operated it. There is no competent, material, or relevant proof to suggest or justify the opinions given, or that appellant could be guilty of contributory negligence; there is only conjecture and yet the question was put haphazardly to the jury in a mixture of law and comment on facts.

V.

OPINION TESTIMONY BASED UPON EXPERIENCE OF THE WITNESS WITH OTHER TYPES AND MAKES OF MACHINERY AND NOT SHOWN TO BE BASED UPON THE PARTICULAR TYPE AND MAKE OF MACHINE IN THE PRESENT CASE IS INADMISSIBLE.

A. Opinion not admissible where no experience with same type of machine as involved in case was shown.

Appellee's witness Blacketer testified that he had had experience operating Gerlinger fork lift trucks and Hyster carriers and expressed the opinion that there was no great danger in operating the Gerlinger fork lift truck without the front boom. The question and answer was not specifically related to the model of Gerlinger lift truck as turned turtle on appellant. The objection was made for appellant:

> "Mr. Dilley. If the Court please, we have an objection on the ground that this evidence is all immaterial. Until this witness is shown to know that he was operating a vehicle which was built in 1952, containing the same changed counter-balance, as was testified to by Mr. Williams here, we think it is completely immaterial and is of no use whatsoever.

The Court. Overruled.

Mr. Cosgrave. Q. In connection with that, I will ask you what year model the lift truck is that you have there, the Gerlinger?

A. 1949.

Q. Does that have a side shifter on it?

A. No.

Q. Well, you know that a side shifter entails more weight on the front end?

Mr. Dilley. Objection, Your Honor, on the ground that this is leading and suggestive.

The Court. Overruled.

Mr. Cosgrave. Q. Would it be necessary to put more weight on the back end to offset that?

A. Yes, it would.

Mr. Dilley. Objection is made, your Honor, on the ground previously stated, and I move that the answer be stricken from the record.

The Court. Denied.

Mr. Cosgrave. Q. If you were here giving your opinion on a Gerlinger carrier that had additional weight on the back end to compensate that, would it make any difference in your opinion?

A. No. I feel the margin of safety would take care of that.

Mr. Dilley. I do not wish to object any more or take the time to make any additional objections. May it be understood that we have an objection to this entire line of questioning so that the record will be preserved?

The Court. It is so understood.

Mr. Cosgrave. Q. Would you go on and tell the jury what the situation is with the Hyster when you drive it up a ramp, what your experience has been?

A. I drove it off a platform, and we have an incline coming into our building that is about 44 inches high, and it slopes up about 30 feet. I drove this Hyster down the ramp without the boom on and then I tried to bring it back up and I couldn't because there wasn't enough weight on the drive wheels to give me traction. Then I tried to back it up and throw more weight to the front end and I couldn't do it then.

Q. In your opinion was that because it had weight at the rear end?

A. Right." (Vol. II, T 165-167.)

Authority for exclusion of the testimony is substantially the same as in the following point hereinbelow discussed.

B. Opinion testimony concerning the effect of relocating a part of the mechanism or adding weight to different location on the machine without qualifying the witness as an expert in such matters is inadmissible.

Appellee's witness, Harry A. Herzog, testified that he had had experience in operating different kinds of fork lift trucks in lumber operations and that, in his opinion, (1) shifting the side shifter mechanism, or (2) adding 1000 pounds to a different location on the Gerlinger carrier would make no difference in its stability, over the objections that the witness had no experience or knowledge qualifying him as an expert concerning the Gerlinger carrier involved in this action. (Vol. II, T 172-174.)

Appellee's witness, Gohrke, assistant manager of appellee, was allowed to testify that in his opinion a

difference of 1500 pounds between the Gerlinger carrier that fell on appellant and the carrier involved in the U.S. Navy Compliance Tests would make no difference as to whether the Gerlinger carrier here involved would pass the compliance tests over the objection that the opinion had no sufficient foundation in data and facts susceptible of proof as distinguished from a layman's observation. (Vol. II, T. 183.)

Neither of these witnesses were shown to have any detailed understanding of the actual factors involved in determining safety factors, nor was it shown just what the capability of the carrier to pass the Navy tests had to do with the circumstances of the events in this case.

The testimony fails to show experience with the model machine that injured appellant. The situation is so unusual that counsel for appellant have been unable to locate a previous case directly in point. It is, however, analogous to the situation in which an expert witness is asked for an opinion following a hypothetical question based upon facts not in evidence. No significant similarity between the experience of the witnesses and the circumstances in which plaintiff was injured appears, nor was it shown that these witnesses were competent to testify that there were no significant differences. We then have reference to cases such as *Raub v. Carpenter,* 187 U.S. 159, 47 L.ed. 119, 23 S.Ct. 72, in which Chief Justice Fuller stated that the trial Court acted properly in sustaining an objection to a question for an opinion from "all that you

known about him yourself," because it called for an opinion based upon facts not shown to be in evidence. Other cases in the same vein are collected in the annotation "Hypothetical Question in Case of Expert Witness Who Has Personal Knowledge or Observation of Facts," in 82 A.L.R. 1338, at pages 1340-1341.

The damaging shot-gun effect of this testimony is readily apparent when it is recalled that the trial Court gave instructions to the jury particularly minimizing engineers leaving open the later testimony of these witnesses purporting to speak from practical experience in the field without knowledge of what the safety factors actually were or what effect changes in design would have.

VI.

ERROR ONCE SHOWN IS PRESUMPTIVELY PREJUDICIAL UNLESS ABSENCE OF PREJUDICE SHOWS FROM THE ENTIRE RECORD ON APPEAL.

Appellant has discussed the principal points of error; the burden is on the appellee to show that the errors were not prejudicial. The errors shown are vital to appellee's defense and appellant believes that no amount of explanation can remove the prejudicial effects of each of the matters discussed. *Lynch v. Oregon Lumber Co.,* 108 F. 2d 282.

CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court for the District of Oregon should be reversed and the cause remanded for a new trial upon the issue of damages alone, or in the alternative, for a new trial upon all issues.

Dated, Santa Rosa, California,
February 7, 1955.

Respectfully submitted,

DILLEY & EYMANN,
ANGELL & ADAMS,
Attorneys for Appellant.

No. 14,541

United States
Court of Appeals
For the Ninth Circuit

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Appellant,

vs.

GERLINGER CARRIER COMPANY, a Corporation,
Appellee.

Appeal from the United States District Court
for the District of Oregon

Appellant's Brief

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HOUGHTON-CARSON COMPANY, PRINTERS

INDEX

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Continued)

Cases (Continued)

Treatises, Statutes

Codes and Rules

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INTRODUCTION

Plaintiff* brought this action against defendant based upon diversity jurisdiction for damages for personal injuries incurred when a machine manufactured by defendant tipped over while he was driving it. The jury returned a verdict in favor of the defendant.

*Plaintiff-appellant is referred to throughout as "plaintiff" and defendant-appellee as "defendant".

Plaintiff specifies as error certain evidentiary rulings which admitted testimony of defendant's witnesses, instructions of the Court below to which he failed to object in any manner, and the sustaining of objections to certain interrogatories.

Basic to an understanding of the entire case is a clear conception of the nature of the piece of machinery involved. Reference to defendant's exhibits will assist in such an understanding. The functions of the piece of machinery, known as a "fork lift truck" were well stated by plaintiff himself (Vol. II, Trans. p. 4) as "to lift logs for the mill; used it in the lumber yard to load lumber onto trucks and to unload lumber from trucks; to load lumber and unload lumber from trucks, or we used it to put logs into the mill." Other witnesses testified that their lifting capacity is 16,000 pounds, and that they lift those loads 16 or 18 feet. (Vol. II, Trans. pp. 162, 163, 199.) Needless to state, the machine could not perform such tasks without some sort of counterweight in the rear, as counsel for plaintiff conceded. (Vol. II, Trans. p. 174.) It is "simply a matter of balance". (Vol. II, Trans. p. 197.)

The machines were always shipped with the boom off. (Vol. II, Trans. pp. 52-53.) This is not, of course, the condition in which they are customarily operated in order to perform the tasks for which they are designed, a fact which was apparent to the

plaintiff who was thoroughly familiar with machinery in general and fork lift trucks in particular. (Vol. II, Trans. pp. 3-4.) It was while backing the machine down a slope in this condition during the process of unloading it that plaintiff was injured. (Vol. II, Trans. p. 14.)

Plaintiff charged the defendant with negligence in substantially two respects: that it failed to warn him of the fact that the machine was unstable and extra-hazardous in the condition in which it was shipped, which it knew or should have known; and putting on the market a machine which it knew or should have known was inherently dangerous when operated under these conditions. (Br. p. 3.)* Defendant denied that it was guilty of negligence in either respect and asserted that plaintiff was himself negligent in operating the fork lift truck at excessive speed, in suddenly applying the brakes, in failing to keep a lookout, and in suddenly turning the steering mechanism. (Vol. I, Trans. p. 32.) The jury, by its verdict, resolved these issues in favor of defendant.

Defendant, in this Brief, has answered only those Specifications of Error which plaintiff has argued; other specifications appearing to have been abandoned by plaintiff.

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*Appellant's Opening Brief is abbreviated "Br.", throughout.

SUMMARY OF ARGUMENT

Appellant's Point I.

The objections to plaintiff's interrogatories were properly sustained.

1. Long, detailed interrogatories on the eve of trial were burdensome and unreasonable.

2. The information was more conveniently available by plaintiff's Motion for Production of Documents.

3. The matter was within the discretion of the trial court.

In order to place this argument in context, defendant desires to bring to the attention of this Court the ruling here under attack. Defendant feels that an understanding of the circumstances preceding will materially assist the Court in appreciating the reasons underlying the trial judge's decision.

This case was filed in August, 1953, and interrogatories were filed by plaintiff on December 8, 1953 (Tr. 44). The case was first set for pre-trial on April 5, 1954, and for trial on April 6, 1954, but pre-trial was then reset for May 10, 1954 (Tr. 44). Pre-trial conference was held on May 10, 1954, and at that time the case was set for trial on June 15, 1954, and witnesses were subpoenaed for that date (Tr. 44). Neither party had requested a jury. On the date set for trial, counsel for plaintiff requested

that the case be heard before a jury, though no previous request or demand had been made. The Court granted the request and set the case for trial four weeks later. It was thereafter, and after the date when the case would have been tried had it not been for plaintiff's last minute request for jury trial, that these interrogatories were first filed. (Vol. I, Tr. p. 44.)

With reference to the question of lateness of the objections, the two days which they were overdue could hardly have occasioned prejudice to the plaintiff, particularly in view of the trial court's ultimate ruling that the objections were well taken. (Vol. I, Trans. p. 25.) The ruling itself must be considered in the light of the nature of the information sought to be elicited, and the fact that the objections were heard only a week before the date set for trial. In addition, it must be considered in the light of plaintiff's Motion for Production of Documents (Vol. I, Trans. p. 21) to which no objection was made and which called for the records of defendant from which the information requested by the interrogatories would have had to be compiled.

Plaintiff (Br. p. 20) refers to the trial court's attitude as "reflected by his ruling on the interrogatories and the motion to produce documents for inspection". As the Record shows, however, defendant made no objection to the Motion to Pro-

duce Documents and the trial court made no ruling thereon. The documents, to the extent that such were in existence and in defendant's possession, were, in fact, available for inspection at the time and place indicated in plaintiff's motion and also at trial. That plaintiff, for reasons best known to himself and his counsel, did not follow up this motion and take advantage of the production of the documents, is the fault of neither the trial court nor the defendant.

The discretion of the trial court in controlling both the manner and extent of discovery is very broad. *Newell v. Phillips Petroleum Co.,* 144 F. (2d) 338 (CCA 10, 1944); *Onofrio v. American Beauty Macaroni Co.,* 11 F.R.D. 181 (W.D. Mo., 1951); *Porter v. Montaldo's,* 71 F. Supp. 372 (S.D. Ohio, 1946). As stated in the latter case:

> "* * * interrogatories which require research on the part of the responding party are objectionable (Citing cases.) In the instant case, the defendant is required to conduct a most detailed research through its own records. This is no demand for simple and easily produced facts, but for a mass of information to be accumulated by the defendant for the benefit of the plaintiff." (71 F. Supp. at pp. 374-375.)

If the court felt, at the eve of trial, that production of the relevant documents was the appropriate manner of proceeding, rather than by interroga-

tories, long, detailed, and complex in their nature, the decision was his to make and should not be disturbed except for a manifest abuse of his judicial discretion. No such abuse has been here demonstrated. The trial court properly sustained defendant's objections.

Appellant's Point II.

Testimony that defendant's officers never heard of any prior accidents was admissible for the purpose of proving lack of notice to defendant of any dangerous propensities of the machine, particularly since plaintiff was contending that defendant knew of the dangers which plaintiff claimed existed.

Plaintiff in this point attacks as erroneous the admission of evidence by the trial court that defendant's general manager and executive vice-president and its assistant general manager had never heard of any incident involving the tipping over of Gerlinger lift trucks. The basis of this objection appears to be that the evidence is hearsay. This objection might be well taken were the evidence introduced for the purpose of proving that Gerlinger lift trucks could not or would not tip over. That was not the reason, however, for the introduction of this evidence.

There never was any issue in the case as to the tipping of the particular lift truck here involved.

The Agreed Statement of Facts in the Pre-trial order sets forth, in fact, that "while the Gerlinger fork lift truck was being operated by the plaintiff, plaintiff suffered injury to his person." (Vol. I, Trans. p. 27.) Two of the contentions of plaintiff, however, were that defendant "knew or should have known" that the fork lift truck was unstable and that it was likely to be operated by individuals such as plaintiff under the conditions and circumstances of this accident and that it was negligent in not apprehending and warning plaintiff of the danger. (Vol. I, Trans. pp. 29-30; Br. p. 3.) Clearly, the question of whether or not defendant had any notice of similar accidents, either by hearsay or otherwise, was relevant to this issue. Equally clearly, defendant could not prove that it did not have any notice of similar accidents other than by putting its officials on the stand and having them testify to the fact that they had never received any such notice.

Plaintiff, in fact, attempted to elicit similar information from defendant's officers, including Williams, whom he called as his own witnesses. For instance, Williams was asked (Vol. II, Trans. p. 48):

> "Q. I assume that you did not give any warning of the type I have been asking about because, in your opinion, there was no danger in operating it with the boom detached, is that right?

A. That is correct."

Gordon Akers, defendant's assembly foreman, called by plaintiff, was asked on direct examination (Vol. II, Trans. p. 65):

"Q. I take it that, having been employed there for 18 years, if you had thought there was any danger you would have given a warning?

A. That is true.

Q. If you thought that there had been a change in design which had so affected its stability as to make it liable to turn over under those conditions, you would have given warnings?

A. Yes."

Such a line of examination discloses that plaintiff considered relevant the question of the state of mind of defendant's employees and officials. In the light of the allegation in his complaint that the defendant "knowing or having notice of said danger" (Vol. I, Trans. p. 4) acted negligently, he could hardly contend otherwise. Defendant's questions to Williams and Gohrke, now attacked as hearsay, were for the purpose of eliciting from them the testimony that they had no notice of any accidents involving Gerlinger lift trucks which might put them upon inquiry or notify them of any dangerous propensities of this machine.

The cases cited by plaintiff, when viewed in the light of the issues framed by the pleadings and the pre-trial order, become totally inapplicable. *First National Bank v. Stewart,* 114 U.S. 224, 5 S.Ct. 45, 29 L.Ed. 101 (1885), involved no question of notice. The quoted question was asked for the purpose of proving that no money had been paid, and since it was not shown that the witness would necessarily have known if it had been, the question of whether he had any information from any source was clearly improper. If, on the other hand, the issue in the case had been whether the bank had any notice that money had been paid, an entirely different situation, analogous to the present one, would have been presented. The fact that there may, as plaintiff states (Br. p. 22), have been many accidents involving Gerlinger lift trucks of which Williams had no knowledge, is not in any way relevant to the question of whether he did have knowledge of accidents which did happen — and the latter, not the former, was the issue in the case.

(It should, incidentally, be noted that plaintiff, in quoting from the *Stewart* case (Br. p. 22), has inadvertently omitted the word "but" from the twelfth line of the quotation, which substantially changes the sense of the quoted sentence. It should read, "It did not appear *but* that many payments of the money have been made to the Bank without knowledge of the witness.")

Plaintiff also cites *Murphy v. Lake County*, 106 C.A. (2d) 61, 234 P. (2d) 712, and *Giddings v. Superior Oil Co.*, 106 C.A. (2d) 607, 235 P. (2d) 843. In the *Murphy* case, the issue was whether or not the County had notice of defects in a road. The Court properly excluded testimony of a witness, not a county official, that he had driven over the road several months previously without accident. There was no showing that any County official knew of this occurrence, and there was substantial evidence from other sources that the County had notice of the defective condition. Consequently, the offered testimony was of no relevance to the question of notice.

The *Giddings* case more nearly approaches the present situation. Plaintiff attempted to show that an action had been filed against respondent in another county for an injury to a child, in order to prove that defendant had notice that its oil well pumps were attractive to children. The Court affirmed the exclusion of the evidence, on the ground that it had not been shown that the circumstances were similar. The situation is precisely the reverse of the present situation, and the case would be relevant to the question of whether plaintiff might here have proved that other Gerlinger fork lifts had turned over. But that is not the situation. Defendant here was desirous of proving that it had not been put on notice that any danger existed,

and therefore showed that its officers had never heard of a lift truck tipping over except in isolated instances under entirely different circumstances. Had there been a substantial number of such instances, or had the circumstances been anything but highly unusual, plaintiff might then have properly contended that defendant did have notice of a dangerous situation requiring some action on its part. In order to disprove such a contention, defendant properly inquired of the witnesses whether they had ever heard of any such instances and then brought out the nature of the few which had occurred. (Tr. II, pp. 53, 186-187.)

All three of the cases discussed above, incidentally, were cases in which the ruling of the trial judge were affirmed. The importance of this is related to the wide latitude in this area given to the trial court, as indicated by the case of *Blackwell v. J. J. Newberry Co.,* 156 S.W. (2d) 14 (Mo. App. 1941), cited at p. 26, Appellant's brief, which discusses at length the opinions of Professor Wigmore on this subject. His conclusion is unrelated to the question of notice, and refers solely to whether the quoted type of evidence is admissible for the purpose of showing defects in the machine, but he nevertheless concludes:

> "The true solution of the conflicting considerations, then, is that evidence of the sort, when relevant, should be admitted, unless *in the dis-*

> *cretion of the trial Court* it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues." II Wigmore (3rd Ed.), p. 430, §444. (Emphasis supplied)

The italicized portion of the foregoing quotation is perhaps explanatory of the fact that plaintiff can cite only affirmed cases for his proposition that the present one should be reversed.

Plaintiff attempts to establish that California law governs the reception of the evidence here involved. (Br. pp. 24-25.) In so doing, he overlooks Rule 43(a) of the Federal Rules of Civil Procedure, which provides that in the case of conflict, all evidence shall be admissible which is admissible under either the old equity rules, the statutes of the United States, or the rules of evidence of the state in which the United States court is *held*. This would indicate that controlling authority in Oregon would be decisive of the question, if it held the evidence to be admissible. Such authority exists.

The case of *Robertson v. Coca Cola Bottling Co.*, 195 Or. 668, 247 P. (2d) 217 (1952), was an action against a bottling company for injuries sustained when a bottle exploded. In the words of the Court (at 195 Or. 681):

> "It is contended that the court erred in permitting agents of the defendant to testify that they had never before heard of a bottle of Coca Cola exploding, and that there had never

before been a claim filed against the company. There is a conflict of authority upon this question. 38 Am. Jur., Negligence, §315, p. 1014; 128 ALR 606, Note. However, this court has at least once indicated its adherence to the rule of admissibility. In *Briggs v. John Yeon Co.*, 168 Or. 239, 122 P. (2d) 444, we said:

" '* * * That other persons had used the floor without mishap is evidence in conflict with the truth of plaintiff's claim and would warrant an inference that the floor was in a reasonably safe condition, but it would be for a jury to say whether it overcame the force of the sworn testimony on behalf of the plaintiff and the reasonable inferences therefrom. * * *'

"Where, as in this case, it is alleged that the defendant knew, or in the exercise of reasonable care should have known of the danger, we think such evidence is admissible." (Emphasis supplied)

The evidence was properly admitted.

Appellant's Point III.

Testimony that defendant's officers had never heard of any prior accidents was admissible for the purpose of proving complete lack of notice, without any showing that the accidents of which they had not heard occurred under comparable circumstances.

Under this point, plaintiff attacks the same testimony as under the previous point, upon the

ground that the appliance in question was not shown to have been given the same use as that here involved, or that the appliance itself was different. Again plaintiff misconceives the nature of the issue when he says,

> "That testimony is harmful under the circumstances of this trial because it inferred to the jury that the Gerlinger fork lift truck would not turn over unless operated under the circumstances of other accidents . . ." (Br. p. 26).

The evidence was not offered to prove that the fork lift truck would not turn over, but that defendant had no notice that it might.

In the two cases cited, both of which affirmed rulings of the trial judge, *Denver City Tramway Co. v. Hills,* 50 Colo. 326, 116 Pac. 125, and *Blackwell v. J. J. Newberry Co.,* supra, the claim agent and store manager, respectively, were denied the opportunity to testify that they had no notice of similar accidents. The *Denver City* case involved a plaintiff who had become entangled in a trolley rope that was left coiled at his feet, and the *Blackwell* case involved a plaintiff who had fallen over a small stepladder in the aisle. Their irrelevance to a case such as the present, wherein plaintiff charges the defendant with having designed and put on the market a machine which was inherently unstable is apparent. As the court said in the *Den-*

ver City case:

> "This may have been the only time in many years that the appellant through its agents was negligent with respect to its trolley ropes . . ."

It further stated:

> "The cases cited to sustain this (opposite) position relate to *structural* position where an appliance is in a permanent fixed position on all cars of a carrier." (Emphasis added)

In the *Blackwell* case, likewise, the Court pointed out that there was no showing that the ladder remained always in one position and was never moved. The two cases would be more nearly relevant were plaintiff charging defendant with having negligently failed to construct this machine in accordance with its usual design. Lack of notice of other accidents would then be irrelevant, in the absence of a showing that they were similarly constructed. But plaintiff has made no such claim. Its claim is that the fork lift was basically unstable by reason of its design (Br. p. 3).

As previously mentioned, the *Blackwell* case relies heavily on the conclusions of Professor Wigmore, who would leave the matter in the hands of the trial judge even in those cases where the issue of notice does not exist.

Defendant feels that this situation is also controlled by the Oregon case of *Robertson v. Coca*

Cola Bottling Co., supra. Taken at its face value, the proposition stated by plaintiff as its heading for this point would require that before defendant could show that it had never heard of any similar accidents involving this or other models of Gerlinger lift trucks, it must first show that the other accidents, of which it had never heard, and which may never have happened, occurred under substantially similar circumstances. The absurdity of this proposition is self-evident. If the evidence may come in, as the *Robertson* case holds, it must come in without such a foundation because such a foundation cannot be laid. The rule of law cited by plaintiff relates to a situation where the evidence is introduced, not for the purpose of showing lack of notice, but for the purpose of showing that the accident could not have happened without some additional cause such as the negligence of plaintiff. In the present case, it was clearly admissible.

Appellant's Point IV.

A. Rule 51 of Federal Rules of Civil Procedure renders this entire point improper, because plaintiff has no standing under any theory to raise errors in the court's charge to which he did not take any exception.

B. The court's instructions were a correct statement of the law and were not erroneous.

C. This is not a situation in which the Court of Appeals should consider errors in the instructions, if any, on its own motion.

At the conclusion of the court's instructions to the jury the following proceedings took place:

> "THE COURT: Under the Rules of Civil Procedure, you are now entitled to state objections to the instructions.
>
> MR. DILLEY: The plaintiff has no objection to the instructions.
>
> THE COURT: For the defendant?
>
> MR. COSGRAVE: The defendant objects to the Court's failure to give defendant's Requested Instructions 10, 11 and 12.
>
> THE COURT: The objections will be noted on the record, Court is now in recess."

Plaintiff's counsel having listened to the court's instructions and having found them as favorable as plaintiff could possibly hope, apparently did not wish them disturbed. It was only when the issues were determined against him that plaintiff decided he would like the instructions changed.

Under this heading, appellant attempts to suggest to this Court what it should consider on its own motion, because appellant is himself precluded from assigning it as error by Rule 51 of the Federal Rules of Civil Procedure. This procedure

should not be countenanced, in that it invites argument by brief of questions which the Rules specifically state cannot be so argued. If this Court wishes to consider an error on the face of the record, that may be its privilege. But appellant should not be allowed to raise, and then argue at length a question which he is not entitled to raise, under the guise of suggesting to the Court what it should consider "upon its own motion". Nevertheless, almost half of the Argument of Appellant's Opening Brief is devoted to this point, and under the circumstances, some rebuttal is in order.

Three cases are cited by plaintiff for the proposition that the Court may consider error on its own motion. The extraordinary nature of all three is the clearest indication of the inappropriateness of such a procedure to the present case. In *Hormel v. Helvering,* 312 U.S. 552, 61 S. Ct. 719, 86 L. Ed. 1037 (1941), the Supreme Court was, in the first place, not considering the Federal Rules of Civil Procedure, but the statutes which gave the Circuit Courts of Appeal power to "modify, reverse or remand" decisions of the Board of Tax Appeals. In that case, the rather far-reaching decision of *Helvering v. Clifford* had come down from the Supreme Court after the B.T.A. decision, and the Supreme Court felt that the *Hormel* case should be returned to the Board for revaluation of the facts in the light thereof. The question there was first raised in the Circuit

Court of Appeals, because it was not suspected until the *Clifford* case was decided.

In both *Shimabukuro v. Nagayama,* 140 F. (2d) 13 (1944), and *Dowell, Inc. v. Jowers,* 166 F. (2d) 214 (1948), the Court indicated that the decision below was so far out of line with the evidence, that had the case come up on an appeal from a verdict directed for the losing party, they would have been required to affirm. One judge in the former, and the Court, in the latter, as a matter of fact, found that a directed verdict for the appellant should have been granted, but the Court in the *Dowell* case nevertheless decided to reverse for a new trial. Furthermore, in the *Dowell* case, the court, which discussed the issue only "because the case is to be retried . . ." (p. 216), said:

> "We think it clear beyond argument that jury was influenced in its mathematical computations by the statement."

The statement referred to is quoted at page 27 of Appellant's Opening Brief. The trial court in effect told the jury that in similar cases of death, the verdict had been "some $10,000 or $15,000" and went on to advise them that the present case involved four persons, a wife and three children. The jury brought in a verdict for $62,000.

The two other cases cited (Br. p. 28) are totally irrelevant. They were, in effect, mere repetitions of rulings on evidence.

The court's instructions in this case were, in fact, a model of plain, clear, and correct instructions to a jury, and plaintiff has not been able to point out, even now, a single error in those instructions.

Plaintiff begins by saying that the trial court "destroyed" vital proof of his case. The beginning of this "destruction" occurred when the trial court ruled that defendant could show a motion picture film of the fork lift truck involved in this case which had not been examined by plaintiff's expert. In the course of his ruling, which was made in the absence of the jury, the experienced trial judge advised counsel that in his opinion, "Engineers are not going to decide this case." (Tr. I, pp. 159, 160.)

The court's opinion and his subsequent instruction to the effect that the jury was not trying the engineering features of the machine as a general proposition was a correct statement of the law. *Ford Motor Co. v. Wolber,* 32 F. (2d) 18 (C.C.A. 7, 1929); *Dillingham v. Chevrolet Motor Co.,* 17 F. Supp. 615 (W.D. Okla., 1936).

To this appellant attributes the "fact" that the jury must have ignored the testimony of Mr. James, whose qualifications "was never challenged". Defendant respectfully suggests that even if the jury

fully credited Mr. James, it still could have found the conditions he referred to sufficiently obvious and sufficiently inherent in the nature of the machine as not to require a warning, or have found plaintiff guilty of contributory negligence. Defendant believes, however, that an examination of the testimony of Mr. James reveals wherein lay the seeds of its "destruction" and its being ignored by the jury. Even a jury of laymen might begin to suspect the competency of a so-called "expert" who, in computing the point at which a machine would tip over, did not find it essential to pay much attention to the height of the center of gravity (Vol. II, Trans. p. 136), or who thought that it was possible to have a fork lift truck which could operate with a rigid rear axle. (Vol. II, Trans. pp. 152-155.)

Plaintiff also claims that it was error to instruct on the question of contributory negligence at all, yet in his brief, at pages 34 and 35, catalogs some of the evidence sufficient to take the case to the jury on this point. As an example, item (e), a statement of an eyewitness of the accident containing the sentence quoted by plaintiff, which the witness admitted he thought was true when it was made some two and a half months after the accident (Vol. II, Tr. 87), but which, almost two years after the accident, he no longer thought was accurate. The jury, of course, might well have trusted his earlier recollection in preference to the later one.

Plaintiff overlooked, in summarizing the evidence of contributory negligence, the statement of plaintiff that he did not see the ground before he backed down and did not know what the road condition was. (Tr. II, pp. 35, 36.)

Plaintiff was represented at trial by counsel who diligently sought to protect his rights, as the numerous objections raised in his Brief demonstrate. They listened to the trial court's charge and found nothing therein to object to. They should not be permitted to gamble on the result and evade the requirements of Rule 51 under the guise of pointing out to the Court what it should review on its own motion. The stringency of Rule 51 is well illustrated by the case of *Woodworkers Tool Works v. Byrne,* 191 F. (2d) 667 (C.C.A. 9, 1951), in which the trial court gave an erroneous charge on *res ipsa loquitur.* Appellant made a general objection to the charge on *res ipsa loquitur.* This Court held that the requirements of Rule 51 were not met because (191 F. (2d) at p. 676):

> "The appellant failed to state *distinctly* to the court below the matter in the charge to which it objected and the ground of its objection." (Emphasis in original)

Appellant's Point V.

The challenged testimony was properly received.

A. The witnesses were properly qualified to testify concerning the matters regarding which they were examined.

B. The qualifications of an expert witness are within the discretion of the trial court.

This point, in both its parts, seems to be based entirely upon two misconceptions. The first is that only a qualified practicing engineer was an "expert" for the purpose of testifying regarding safety factors in the balance of this machine, and the second that a man must have driven this precise model of machine in order to be able to testify about it. Neither is correct.

Witness Blacketer testified to extensive experience with fork lift trucks of various makes, including Gerlingers. (Vol. II, Tr. pp. 161-163.) Witness Herzog likewise testified to extensive experience with Gerlinger fork lift trucks. (Vol. II, Trans. pp. 170-171.) Witness Gohrke, defendant's assistant manager, likewise had dealt with lift trucks for many years. (Vol. II, Trans. p. 180.) The fact that these witnesses were not engineers did not in any way affect their ability to express an opinion about the stability of these machines. They had used them, run them over various types of terrain, and ac-

quired an extensive practical experience with them. The trial judge apparently felt that they were qualified by reason of that experience to testify regarding the likelihood of the machine tipping over under various conditions. As the Court stated in *Paradise Prairie Land Co. v. U.S.*, 212 F. (2d) 170, 173 (C.A. 5, 1954):

> "The trial judge is vested with a broad judicial discretion in admitting or rejecting expert testimony, but lack of a statutory license to practice surveying is not of itself sufficient to justify the rejection of the testimony of one who is otherwise qualified as an expert.
>
> "An expert is one who qualifies as such by reason of special knowledge and experience, whether or not he is authorized to practice in his special field under a licensing requirement imposed by statute. The inquiry by the trial judge as to the qualifications of such a witness should be whether or not the witness possesses the special knowledge and experience to qualify him as an expert, not whether or not he has complied with the state's licensing requirements to practice that profession."

The *Paradise Prairie* case is one of the rare instances in which an Appellate Court found error in a ruling on the qualifications of an expert, and is, perhaps, explained by the fact that the court had already concluded to reverse and remand the case as well as by the fact that the ruling *excluded* evi-

dence. The general rule, as stated in *Diesbourg v. Hazel-Atlas Glass Co.,* 176 F. (2d) 410 (C.A. 3, 1949), is that "The matter of who may qualify as an expert is pretty much within the discretion of a Trial Judge," as against a claim that "plaintiff's expert was no expert at all". In *Chicago Great Western Ry. Co. v. Beecher,* 150 F. (2d) 394 (C.C.A. 8, 1945), the Court correctly summed up the rule as follows (p. 400):

> "In the federal courts the qualifications of an expert witness before he will be permitted to express an opinion are a matter within the reasonable discretion of the trial court and its ruling thereon will not be reversed unless that discretion was abused. (Citing cases)"

The Oregon rule is in accord. In *Stonebrink v. Highland Motors, Inc.,* 171 Or. 415, 137 P. (2d) 986 (1943), the court stated, in reference to the propriety of permitting a machine shop operator to testify that an automobile jack was made of cheap metal, and poorly constructed:

> "Whether a witness is qualified to testify as an expert is a matter resting within the sound legal discretion of the trial court and its ruling in reference thereto will not be disturbed on appeal unless there is an abuse of discretion. (Citing cases.)" (171 Or. at pp. 425-426.)

CONCLUSION

Plaintiff had a fair trial on all the issues. His case was submitted to the jury upon instructions which he at that time found unexceptionable. The jury resolved the issues against him. Nevertheless, he would now have this Court reverse and remand the case for a new trial "upon the issue of damages alone, or in the alternative, for a new trial upon all issues." (Br. p. 41.)

Plaintiff's case at best amounted to nothing more than a statement of opinion by his "expert" witness that the design of defendant's lift trucks was unsafe, and there is substantial authority that a mere difference in judgment among engineers about the appropriate method for designing a piece of machinery is not sufficient evidence of negligence to take a case to the jury. See, e. g. *Ford Motor Co. v. Wolber,* 32 F. (2d) 18 (C.C.A. 7, 1929); *Dillingham v. Chevrolet Motor Co.,* 17 F. Supp. 615 (W.D. Okla., 1936).

The evidentiary rulings assigned as error all admitted rather than excluded evidence. The jury had all the facts before it, and properly so under the liberal policy established by Rule 43(a) of the Federal Rules of Civil Procedure and the controlling decisions. The objections to instructions are not properly before the Court because not made below. The sustaining of the objections to the interroga-

tories was well within the discretion of the trial court, whose ruling thereon was correct. The judgment of the United States District Court for the District of Oregon should be affirmed.

Respectfully submitted,

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No. 14542

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER BANKS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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INDEX

STATUTES

RULES OF PROCEDURE

TABLE OF CASES

No. 14542

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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Appellee denies the jurisdiction of the Court of Appeals to hear this matter as an appeal from a final judgment of conviction as notice of appeal was not filed within the time prescribed by law, judgment appealed from having been entered on June 4, 1954, and notice of appeal having been filed September 2, 1954.

Federal Rule of Criminal Procedure 37; *Crow* v. *U. S.* (C. A.-9th; 1953) 203 F. 2d 670; *Wagner* v. *U. S.* (C. A.-4th; 1955) 220 F. 2d 513.

PRELIMINARY STATEMENT

Appellee, United States of America, finds itself in a peculiar position in answering Appellant's "brief" in this matter. Appellant's brief, as an examination will disclose, is replete with unsworn allegations of fact interspersed with arguments. Appellee by no means contends that any appellant should be denied his rights because of ineptness in procedural law or lack of familiarity with the orthodox methods of presenting an appeal. Appellee does, however, wish to present a preliminary apology to the Court of Appeals for the mode of answer and argument, a position to which it is forced by the peculiar nature of the material with which it is confronted.

STATE OF THE RECORD IN THE COURT OF APPEALS

The appeal in this case has been before the Court of Appeals for the Ninth Circuit on a number of occasions, e. g., March 21, 1955 — order denying motion for appointment of counsel; July 17, 1955 — order denying motion for clarification of the record; April 3, 1956 — order granting leave to proceed on typed

record and briefs; June 4, 1956 — order denying motion to proceed in forma pauperis. Not all of the above-named orders have been furnished to appellee, but the foregoing information has been furnished by the Clerk of the Court of Appeals and we assume it to be correct.

Appellee likewise assumes that this proceeding stems from the order of April 3, 1956, granting leave to proceed on *typed record* and briefs. If this assumption be correct, appellant has produced no record, typed or otherwise, and has ordered none from the court reporter.

WHAT IS THE NATURE OF THIS PROCEEDING?

Appellee is at a loss to understand exactly what the nature of this proceeding before the Court of Appeals is. From its nature, it may be considered to fall into one of six categories:

a. An appeal from a criminal proceeding in the trial court of the Northern Division, Western District of Washington.

b. An appeal from a denial of relief under 28 U.S.C. 2255 in the trial court.

c. An original proceeding under 28 U.S.C. 2255 in the Court of Appeals.

d. An appeal from a denial of habeas corpus relief (28 U.S.C. 2241) in the trial court.

e. An original habeas corpus proceeding in the Court of Appeals.

f. An appeal from the trial court's order of September 6, 1956, denying leave to proceed in forma pauperis.

* * * * * * * * *

a. This proceeding cannot be a conventional criminal appeal within the meaning of Federal Rule of Criminal Procedure 37 *et seq.* Appellant filed no notice of appeal until three months after the entry of judgment. This Court has already considered this point and dismissed appellant's motions based thereon. *Banks* v. *U. S.*, Misc. 413, January 31, 1955, Court of Appeals for the Ninth Circuit.

b. It cannot be an appeal from a denial of relief under 28 U.S.C. 2255 in the trial court. The record available to appellee indicates that a "motion attacking sentence" (which appellee construes to be a proceeding under 28 U.S.C. 2255) was disposed of by the trial court on October 26, 1954, in an order filed October 27, 1954, and transmitted to the Court of Appeals on October 28, 1954. No appeal appears to have been taken from this order.

c. It cannot be an original proceeding under 28 U.S.C. 2255 in the Court of Appeals. This Court has no jurisdiction. *Flynn* v. *U. S.* (C. A.-9th; 1955) 222 F. 2d 541.

d. It cannot be an appeal from a denial of habeas corpus relief in the trial court. A petition for habeas corpus relief was denied by the trial court by an order dated December 3, 1954. No appeal appears to have been taken from such order.

e. It cannot be an original habeas corpus proceeding in the Court of Appeals. This Court has no jurisdiction. *Meek* v. *California* (C.A.-9th; 1955) 220 F. 2d 348.

f. It cannot be an appeal from the trial court's order of September 6, 1956, denying leave to proceed in forma pauperis. That order does not appear to have been appealed from nor is it before this Court in any form. The Court of Appeals has twice denied appellant such relief. *Banks* v. *U. S.*, Misc. 413, January 31, 1955, and June 8, 1955, Court of Appeals for the Ninth Circuit. Nothing contained in appellant's brief bears on this issue.

However, be the foregoing as it may, appellee will assume that appellant's unsupported allegations are being considered in some manner by the Court of Appeals and will attempt to answer in kind.

I

There Is No Record Available For Review

Examination of appellant's brief discloses no transcript of the proceedings at the trial although his brief is replete with *ex parte* and unsupported allegations of what took place. There has thus been neither compliance with Federal Rule of Criminal Procedure 39 nor the Court's order of April 3, 1956, *supra*. While it is hornbook law to state that the Court cannot consider appellant's allegations absent a reporter's transcript, nevertheless *Wallace* v. *U. S.* (C.A.-8th; 1949) 174 F. 2d 112 holding that the record is insufficient for an appellate review is squarely in point. Appellee feels that this deficiency alone would support a motion to dismiss the appeal but will, nevertheless, attempt to deal with appellant's points in some detail.

II

Nature of Appellee's Evidence

In view of the fact that appellant has presented no reporter's transcript of proceedings at trial to the Court, appellee does not feel called upon to do so. The issue of appellant's right to such a transcript in forma pauperis has been passed upon by both trial and appellate courts. Appellee does not feel that appellant

can force it to produce a transcript simply to refute his unsworn allegations in his brief.

Appellee has, therefore, sought to assist the Court of Appeals by furnishing an affidavit from Richard D. Harris, the former Assistant United States Attorney who handled the case and the only one who can furnish disinterested testimony.

III

Denial of Right to Speedy Trial

Appellant first complains of the denial of his constitutional right to a speedy trial. Appellant states that he "did not acquiesce in the postponement of his trial." The affidavit of Richard D. Harris (page 1, lines 25-28) shows that the case was called for assignment nine (9) times before it was finally set. There is nothing before the Court to indicate that appellant, who was at liberty on bond, sought to accelerate his trial date on any of these occasions. Not having demanded a speedy trial, he waived the right to same. *Collins* v. *U. S.* (C.C.A.-9th; 1946) 157 F. 2d 409; *Danziger* v. *U. S.* (C.C.A.-9th; 1947) 161 F. 2d 299. Appellant's citations of *Henning* and *Frankel* are not in point. They both deal with petitions to the Court of Appeals for mandamus to compel the District Court to grant speedy trials *in futuro*.

IV

Denial of Witnesses for Defense

Appellant would seek to have the Court of Appeals believe that subpoenae for his essential witnesses were timely served, that the witnesses failed to appear and a continuance was denied. The true state of affairs is revealed by the affidavit of Richard D. Harris (page 2, line 4 to page 3, line 10). Appellant claims that these witnesses were essential to his defense of entrapment. If this be so, then appellant *must* have known from December 22, 1952, to and including the date of trial, April 27, 1954, a period of sixteen months, that (a) he possessed and transferred the narcotics, and (b) that his defense consisted not of a denial but rather of an admission coupled with the defense of entrapment. Under these circumstances, failure to summon *any* witnesses until April 19, 1954, (the day before the original trial date) and the particular witnesses of whose absence complaint is made (so far as the available record discloses) was inexcusable remissness on the part of appellant, not an abuse of discretion by the judge. *Neufield* v. *U. S.* (C.A.D.C.-1941) 118 F. 2d 375 at 385:

> "An accused cannot omit to inform his lawyer *during an extended period — in this case approximately eight weeks* [i. s.]—before trial of the existence of a possible material witness and then successfully charge the trial judge with an abuse

of discretion for refusing a demand for the production of the witness not made until the moment the case is called."

V.

Hostile Comments of the Trial Judge

Appellant's theory, as embodied in his brief, under this heading amounts to an allegation of prejudice by reason of the trial court's (a) expediting the trial, and (b) instructing the jury that leniency was not within their province in deliberating on guilt or innocence.

The *Quercia* case cited by appellant involved a trial court's (under the guise of commenting on the evidence) departure from that field entirely and confining himself to an attack on the credibility of the defendant, a clear invasion of the jury's province. In this aspect of this appeal, as in all the others, the absence of a reporter's transcript prevents an intelligent assessment of whatever comments the trial court is alleged to have made. " . . . comments of the court must be read in their context and viewed with a perspective of the whole proceedings." *Ochoa* v. *U. S.* (C.C.A.-9th; 1948) 167 F. 2d 341 at 344. Appellant cannot single out a few isolated words and base an appeal thereon. The affidavit of Richard D. Harris (page 3, lines 12-29) raises a profound doubt that the

comment about "rattling off" was ever made. If it was made, it could scarcely (under the fact situation revealed by Mr. Harris's affidavit) have been other than an effort to expedite a lagging trial. *Williams* v. *U. S.* (C.A.-8th; 1954) 216 F. 2d 529, Headnote 6 is directly in point.

As to the alleged comment of the trial court that the jury should not consider leniency, the statement if made was quite clearly correct law and could not have operated to appellant's detriment. *Gantz* v. *U. S.* (C.C.A.-8th; 1942) 127 F. 2d 498 at 504.

In any event, there is no record of objection or exception to the trial court's remarks, if such were made. *Baldwin* v. *U. S.* (C.C.A.-9th; 1934) 72 F. 2d 810.

VI

Failure to Instruct On Entrapment

Since there is no record of the evidence before the Court, the Court cannot consider the failure of the trial court to instruct on the theory of the law set out in appellant's brief. *Baldwin* v. *U. S.* (C.C.A.-9th; 1934) 72 F. 2d 810.

There is no record showing defendant-appellant's requested instructions, if such were correct and if such

were requested. *Andrews* v. *U. S.*, 162 U.S. 420, 40 L.Ed. 1023, 16 S.Ct. 798 (1896).

The Clerk's minutes for the day on which the Instructions were given indicate, if only in a negative way, that (a) instructions *were* given, and (b) that no exceptions were noted to the instructions given, or requested instructions, if any, omitted.

VII

Failure to Direct a Verdict of Acquittal

Appellant's raising this point on appeal can only be ascribed to his lack of understanding as to what a directed verdict of acquittal amounts to. Appellant in his brief seeks either to re-argue evidence which has already been passed upon by a jury or, at best, to show that there was a conflict between his evidence and that presented by the appellee. The citations are legion to the effect that, upon conflicting evidence, a judgment of acquittal should not be granted. *Gorin* v. *U. S.* (C.C.A.-9th; 1940) 111 F. 2d 712 at 721.

CONCLUSION

For the reasons above set forth and especially in view of the failure of appellant to present any transcript of evidence in support of his claimed errors, it is submitted that the appeal should be dismissed. If this Court on this record concludes to act thereon, every conviction of any defendant which has not been affirmed by the Circuit Court is open to a similar proceeding.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

EDWARD J. McCORMICK, JR.
Assistant United States Attorney

No. 14543.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

TEXTBOOK

No. 14543.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Pleadings.

Appellant was charged in an indictment filed in the United States District Court, in and for the Southern District of California, with violations of U. S. C., Title 18, Sec. 371; U. S. C. Title 21, Sec. 174—Conspiracy, Illegal Sale and Concealment of Narcotics. Count one charged a conspiracy with one Albert Hollins; Count Two charged a sale; Count Three charged a sale; Count Four charged a concealment, etc.; and Count Five charged a concealment, etc. (The indictment was in seven counts, but only five referred to defendant Brown.) [Clk. Tr. pp. 2-5.]

Defendants made a motion to dismiss Counts 2, 3, 4 and 5 of the indictment which was denied [Clk. Tr. pp. 7-9]. Defendants entered a plea of not guilty as charged [Clk. Tr. p. 10].

The matter proceeded to trial before a jury [Clk Tr. p. 11].

Appellant was found guilty on all five counts [Clk. Tr. p. 20]. Appellant was sentenred to five years in a penitentiary on each count, the sentences to run concurrently, and a $250 fine [Clk. Tr. p. 22]. This conviction was reversed by the Ninth Circuit Court of Appeals [Clk. Tr. p. 27].

The matter again proceeded to trial by jury [Clk. Tr. p. 22]. At the second trial Count One charging conspiracy was dismissed, and the trial proceeded on Counts 2, 3, 4 and 5 [Clk. Tr. p. 29]. Appellant was adjudged guilty on the four counts upon which he was tried [Clk. Tr. p. 37]. As a result of this second conviction, defendant was sentenced to ten years imprisonment on each count to run consecutively, making a total sentence of 40 years imprisonment and a total fine of $8,000 [Clk. Tr. p. 38].

This is an appeal from the judgment rendered against defendant [Clk. Tr. pp. 41-42].

Basis of Jurisdiction.

It is contended that the District Court had jurisdiction by virtue of Title 18, Section 546, U. S. C. A., and this court has jurisdiction to review the judgment in question by virtue of Title 28, Sections 41(2) and 225(a) U. S. C. A.

Statement of the Case.

By way of an introductory statement it may be pointed out that at the first trial, one Frank J. Stafford testified. Stafford was deceased at the time of the second trial and his testimony was read by one George R. Davis [Rep. Tr. pp. 13-21]. In referring to this testimony, we shall refer to it as the testimony of Frank J. Stafford.

Frank J. Stafford, an admitted narcotic addict [Rep. Tr. p. 74], testified that in February or March, 1953, he met defendant [Rep. Tr. p. 23]. He made an appointment with Brown over the telephone [Rep. Tr. p. 36]. As a result of this telephone conversation, Brown came to his home at which time they had a conversation [Rep. Tr. p. 27]. He asked Brown if he could furnish him with two ounces of heroin. Brown told him that he thought he could out of four ounces which he had for his personal use. The witness then gave Brown his telephone number with instructions to call him [Rep. Tr. p. 28]. He next met Brown on Adams and Normandie about March 4th [Rep. Tr. p. 31]. He had been furnished with $600 in Government funds [Rep. Tr. p. 32]. He entered the car with Brown and drove to 22nd Street and he gave Brown the $600. They then proceeded to 21st Street where they saw another man. Brown told the man that he was the party that wanted the heroin and to let him have it when he came back [Rep. Tr. p. 33]. Brown returned him to Adams and Normandie and he went back and picked up the heroin [Rep. Tr. p. 34]. He returned to his home and gave it to Officer Ross [Rep. Tr. p. 35].

He next saw Appellant about March 13 [Rep. Tr. p. 43]. Appellant told him to meet him at Adams and Normandie. This time he also had $600 in Government funds [Rep. Tr. p. 45]. They drove to 28th and Budlong. They looked at courts which Brown said he was contemplating buying and he gave Brown $600. Shortly thereafter two girls drove up in a car and handed Brown a package. Stafford was given two packages from this larger package by Hollins [Rep. Tr. p. 47].

Appellant makes no contention that the exhibits introduced into evidence did not contain heroin, nor does he make any contention that the exhibits were not properly identified by Stafford, as the ones he testified that he received.

On cross-examination Stafford admitted that he was a user of heroin at about the time this transaction took place [Rep. Tr. p. 73]. He was a confirmed addict over a period of years [Rep. Tr. p. 74]. He had a prior conviction for narcotics [Rep. Tr. p. 78]. Brown never personally handed him any narcotics [Rep. Tr. p. 57-A].

Philip P. Ross testified that he was a federal narcotic officer. Frank J. Stafford was employed as a narcotic informer [Rep. Tr. p. 80]. He was hidden in Stafford's home about February 23, 1954, with another narcotic officer. He saw Appellant drive up and enter the house [Rep. Tr. p. 82]. He heard Stafford ask Brown to purchase some narcotics and Brown replied, "No. I have just enough for my own use." Brown said he had a shipment coming and he would let Stafford have two ounces of stuff [Rep. Tr. p. 83]. He testified that he gave Stafford $400 [Rep. Tr. p. 84]. "He said he was going to purchase narcotics from Brown." He followed Stafford to Adams and Normandie. This was about 7:30 or 8:00 o'clock [Rep. Tr. p. 85]. He saw Stafford enter Brown's car and drive away. He did not follow them [Rep. Tr. p. 86]. When Stafford returned he handed him some narcotics [Rep. Tr. p. 87].

He was again present in the home of Stafford on March 13, 1953, with agents Perry and Richards [Rep. Tr. p. 95]. They again provided Stafford with $600. He followed Stafford to Adams and Normandie and saw

Stafford enter an automobile with Brown and Hollins [Rep. Tr. p. 96]. He saw Stafford later that evening at his home and Stafford gave the officers some packages containing narcotics [Rep. Tr. p. 97].

On neither occasion did he see Appellant hand Brown any narcotics [Rep. Tr. p. 99]. None of the money given Stafford was ever discovered on Brown [Rep. Tr. p. 100]. At the time officer Ross had Stafford making these alleged purchases he did not know that he was an addict [Rep. Tr. p. 103]. He did not search the informer Stafford after he returned to the house [Rep. Tr. p. 104]. He testified that they more or less have to depend upon information secured from addicts [Rep. Tr. p. 117].

Norman D. Perry testified that he was a federal agent [Rep. Tr. p. 126]. On February 24, 1953, he saw Appellant enter Stafford's house and then leave [Rep. Tr. p. 127]. He next saw Appellant on March 14th [Rep. Tr. p. 129]. He gave Stafford $600 and accompanied him to Adams and Normandie [Rep. Tr. p. 130]. He then returned to Stafford's residence and shortly thereafter he returned with some narcotics [Rep. Tr. p. 131]. At no time did he see Appellant hand Stafford any narcotics [Rep. Tr. p. 143].

Michael C. Coster testified that he was a narcotic agent [Rep. Tr. p. 171]. On February 24th he was in the home of Frank Stafford with Agent Ross [Rep. Tr. p. 172]. He saw Brown approach and enter the house and heard a conversation between Stafford and Brown concerning narcotics [Rep. Tr. p. 173]. He next saw Brown on March 4th at Normandie and Adams [Rep. Tr. p. 174]. He saw Stafford enter Brown's car and they drove off [Rep. Tr. p. 175]. They returned to

Adams and Normandie and Stafford got in his car. They followed Stafford to 21st and Mariposa where they observed him in conversation with another man [Rep. Tr. p. 176]. They then returned to Stafford's home where they were handed some narcotics [Rep. Tr. p. 177]. He then again saw Brown on March 13th [Rep. Tr. p. 178]. He and Hollins entered an automobile. He followed them, but got lost [Rep. Tr. p. 179].

Annette Cannady testified that on March 13th she was present at some apartment on Budlong [Rep. Tr. p. 229]. She saw Appellant when she arrived there [Rep. Tr. p. 230]. Appellant came over and got in the car and they drove off [Rep. Tr. p. 231].

Celeste Bates testified that she was present with Miss Cannady on March 13th. They rode over to 38th and Budlong to pick up the defendant. She did not see Miss Cannady hand the defendant a package [Rep. Tr. p. 245].

Specification of Errors.

1. The Court erred in failing to dismiss the indictment.

2. Insufficiency of the evidence to justify the judgment of conviction.

3. Misconduct of the Assistant United States Attorney which prevented the defendant from having a fair and impartial trial.

4. The Court erred in its instructions to the jury.

5. The trial Court abused its discretion in the pronouncement of judgment and sentence.

ARGUMENT.

I.

The Court Erred in Failing to Dismiss the Indictment.

Appellant was charged with violating Title 21, Sec. 174, of the U. S. Code.

Count Two: This count fails to allege one of the necessary elements of the offense, in that it fails to state that the narcotics drug referred to therein was imported into the United States "contrary to law." Title 21, Section 174, U. S. Code, expressly states the offense in these terms:

> "If any person * * * imports * * * any narcotic drug * * * contrary to law, or * * * sells * * * any such narcotic drug after being imported * * * knowing the same to have been imported contrary to law * * *"

Appellant contends that under this statute a valid indictment must allege not only that defendant sold the narcotic drug knowing that it had been imported contrary to law, but also that the drug was "imported contrary to law."

Crank v. United States, 61 F. 2d 620;

Wisbart v. United States, 29 F. 2d 103;

United States v. Cook, 84 U. S. 168, 174;

Hartson v. United States, 14 F. 2d 561.

Since the fact of the importation contrary to law must be established, by proof or presumption or both, the full allegation must be in the indictment as to which such proof would be directed.

See:

Pon Wing Quong v. United States, 111 F. 2d 751.

Counts Three, Four and Five are objected to on the same ground as Count Two, above.

Counts Three, Four and Five are also defective in that each Count states more than one offense.

Each of the various acts prohibited by Section 174, Title 21, U. S. Code, constitutes a separate offense, and such act is punishable separately.

See:

Walsh v. White, 32 F. 2d 240;
Palermo v. United States, 112 F. 2d 922;
Corrello v. Dutton, 63 F. 2d 7.

Count Three charges that defendant Brown and Hollins did * * * sell * * * and knowingly assist in so doing * * * a certain drug.

Count Four charges that defendant did * * * receive, conceal, and facilitate the transportation of * * * a certain drug.

Count Five charges that defendant Brown and Hollins did, * * * receive, conceal, and facilitate the transportation of a certain drug * * * and knowingly assist in so doing * * *.

We respectfully submit that each of the acts constituted a separate offense, and only one such act may be included in each count.

II.
Insufficiency of the Evidence.

It is the contention of Appellant that the evidence is insufficient to sustain the judgment. It might be pointed out here that there is no evidence in the record that Appellant ever had any narcotics in his possession relative to the sale of March 4th. The testimony of Frank Stafford was to the effect that some other man delivered the package to him [Rep. Tr. p. 34]. With relation to the alleged sale of March 13th, he testified that he was given the narcotics by Hollins [Rep. Tr. p. 47]. Appellant contends that where it is not shown that defendant had the narcotics in his possession, then it is incumbent upon the prosecution to prove that the narcotics were imported contrary to law.

It is the possession which raises the presumption of unlawful importation. Unless it is shown that defendant was in possession of the narcotics then this presumption cannot arise and the burden of proof is then on the government. Neither is there any evidence in the record that Appellant concealed or facilitated the transportation of narcotics.

The last sentence of this section must be strictly construed.

United States v. One Studebaker, 40 F. 2d 557.

III.

Misconduct of the Assistant United States Attorney.

Appellant contends that the Assistant United States Attorney was guilty of prejudicial misconduct which prevented him from having a fair and impartial trial. During defendant's defense he offered certain witnesses to impeach the reputation of Frank Stafford for truthfulness, honesty and integrity. This the defendant had a right to do. Nevertheless, we have the attorney making such statements and asking such questions as follows:

> "Mr. Neukom: I object to that, your Honor, upon the ground that no effort was made to impeach the testimony of Stafford during his lifetime and I do not think it is a material issue in this case." [Rep. Tr. p. 193.]

> "Q. Isn't it true that you are testifying about Mr. Stafford because you know his lips are sealed? A. No.

> Q. And he can't answer you? A. No." [Rep. Tr. p. 201.]

> "Q. You knew of Mr. Brown, didn't you? A. I did.

> Q. And you had had occasion to hear about him in conjunction with police work, hadn't you?" [Rep. Tr. p. 207.]

> "Q. As a matter of fact, Mr. Ayers, aren't you actually testifying in this court here because you are a good friend of Mr. Gordon and you want to help Mr. Gordon's client out? A. I am a good friend of everybody, not singling anyone out.

> Q. Not a very good friend of the dead Mr. Stafford, are you? A. I wasn't his enemy.

Q. You were not willing to testify against his reputation when he was alive, were you? A. I was. I was available." [Rep. Tr. pp. 219-220.]

The prosecuting attorney must endeavor to conduct prosecution in such manner as to avoid unnecessary errors in trial.

Taliaferro v. United States, 47 F. 2d 699.

Prosecutors should refrain from making statements that they might prove things derogatory to a defendant unless they are able to make such proof and intend to do so.

People v. Reznick, 75 Cal. App. 2d 832.

Prosecutors should remember that accused is entitled to a fair trial, and that they are duty bound not to take advantage of their official position so as to deprive him of such right.

People v. Burnette, 39 Cal. App. 2d 215.

It will be seen from a careful reading of the cross-examination of these witnesses [Rep. Tr. pp. 195, 204, 214] that it was calculated to prejudice the rights of defendant. The cross-examination was directed to form the impression that the evidence was improper and had no place in the trial. Clearly, this was error.

IV.

Error in Instructing the Jury.

At the conclusion of the trial the Court gave the following instruction:

> "In a case where two or more persons are charged with the commission of a crime, the guilt of the accused may be established without proof that all the defendants did every act constituting the offense." [Rep. Tr. p. 257.]

Appellant contends that this was an erroneous statement of law. In this case originally there were two defendants. The instructions state in effect that Appellant could be convicted without proof that Hollins did all the acts constituting the offense [Rep. Tr. p. 257]. In other words, under this instruction Appellant could have been convicted by a failure to establish a case against Hollins.

V.

The Court Abused Its Discretion in Pronouncing Sentence and Judgment.

When Appellant was first tried he was charged with five counts in the indictment [Clk. Tr. p. 11]. Upon his conviction for these five counts he was given five years on each count to run concurrently, for a total of five years imprisonment and a $250 fine [Clk Tr. p. 22]. He appealed this conviction and it was reversed [Clk. Tr. p. 27]. Upon his second trial, Count One of the indictment was dismissed and Appellant was convicted on four counts. The trial court then ordered defendant imprisoned for forty years, and a total fine of $8,000 [Clk. Tr. p. 38]. Thus we have the defendant sentenced to 35 more years

and an increase in fine of $7,750 on lesser counts. The only logical reason that can be advanced for such a heavier penalty is to penalize and inflict punishment upon defendant for taking an appeal from the first conviction. Clearly this amounts to an abuse of discretion. There is nothing in the record to show any changed circumstances or conditions that would warrant the infliction of a heavier sentence. In fact there was one less count.

Where it is manifest that the sentence imposed is excessive, the Appellate Court may, in the exercise of its statutory power to correct errors in the judgment appealed from, reduce or modify the same.

Bates v. United States, 10 Fed. 92.

It might here be pointed out that the sentence imposed in this action is probably one of the severest ever meted out. It should also be pointed out that Counts Two and Four arose out of the same transaction and Counts Three and Five arose out of the same transaction. There is nothing in the record to show that a greater penalty should have been imposed than in the first trial.

Where it appears from the evidence that the sentence imposed is excessive or visits too severe a punishment, the Appellate Court may, in the exercise of its statutory power to correct errors in the judgment appealed from, reduce or modify the sentence.

3 *Am. Jur.* 689.

The second sentence in this action is so disproportionate to the first sentence that it shocks one's sense of fairness and justice. Such a sentence can serve only one purpose. That is, to serve as a warning and to discourage defendants in criminal actions from appealing. Certainly

the defendant had a right to appeal. This is further borne out by the fact that the prior conviction was reversed. We do not think that a person should be punished solely for the reason that he has taken an appeal. Was the defendant compelled to stand on the original conviction which had been erroneously obtained, or suffer greater penalties by appealing the erroneous conviction? It is clear that the sentence was given because of passion or prejudice, for no other reason appears in the record.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment should be reversed, or in the event that the judgment is affirmed, it should be modified to conform to the sentence rendered upon the first trial.

Respectfully submitted,

WALTER L. GORDON, JR.,

Attorney for Appellant.

No. 14543

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLEE'S REPLY BRIEF.

Statement of the Case.

Appellant's statement of the case, as far as it goes, is a fair summary. Inasmuch as the case is here on a relatively short typewritten Reporter's Transcript, we will not add to the record by giving a substitute Statement of the Case.

Attention is invited that on the former trial, appellant Brown took the stand, he elected not to testify in this the re-trial.

At the former trial no effort was made by the defense to impeach the credibility of the now deceased witness Frank J. Stafford, although at the former trial one of the impeaching witnesses, *i. e.,* Ben Ayers, admitted he had been subpoenaed at the first trial [R. p. 220][1] but did not

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[1]"R" refers to Reporter's Transcript of Proceedings.

testify [R. pp. 222 and 224]. Witness Ayers had no knowledge of the facts of this case, his testimony, if desired, was only as to the credibility of the witness Stafford.

Appellant Brown made the last sale of narcotics on March 13, 1953. The Narcotics Agents did not arrest Brown until April 17, 1953 [R. p. 111]. An explanation of the delay in the arrest was to permit a continuance of the investigation because information was had that another person, a Mr. Hollins was also involved in the sale of narcotics [R. p. 112].

Statutes Involved.

Title 21 United States Code Section 174 provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violations of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and proba-

tion shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557 (b) (1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of this Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the norcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. * * *"

ARGUMENT.

I.

No Error Was Committed by the Court in Refusing to Dismiss the Indictment.

The substantive counts of which the appellant was convicted, *i. e.,* counts 2 through 5, inclusive, substantially followed the language of the statute (21 U. S. C. Sec. 174) and are substantially in the language of like indictments that have been sustained under this and similar charges.

Count Two is the *sale* of March 4, 1953. [See Clk. Tr. pp. 4 through 5 for the counts involved in this appeal.

Count Four is the "receive, conceal and facilitate the transportation" of the same heroin as set forth in count two.

Count Three is the sale of March 13, 1953, whereas *Count Five* is the concealment, etc. of the same heroin described in Count Three.

There is no merit to appellant's tenuous argument to the effect that the indictment should have directly alleged that the narcotic drug was "imported contrary to law". The equivalent of such an allegation is fully set forth in each count of the indictment, it reads: ". . . which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174." [Clk. Tr. p. 4.][2]

We agree with appellant, as stated on page 8 of his Opening Brief that a "sale" is a "separate offense," and punishable separately to the offense of receiving and con-

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[2]"Clk. Tr." refers to the Clerk's Transcript of Record.

cealing the heroin. Obviously, one could hardly transport, or aid and assist in transporting a narcotic drug without first receiving it by actual or constructive possession, and such reasoning is equally true for the receipt or concealment of the forbidden drug. It, therefore, seems logical that a sale is a distinct offense, whereas the receiving, concealing and transportation are so logically interwoven that such acts constitute but one offense and are properly an offense distinct to themselves and apart from a sale. If such is not true, then surely some effort to ask for an election as to the charge of receiving, concealing or transportation should have been urged, none was.

An indictment that was held sufficient, and one that employed language strikingly similar to the instant indictment is to be noted in the case of:

> *Parmagini v. United States,* 42 F. 2d 721 (C. A. 9, 1930), cert. den. 283 U. S. 818.

In the *Parmagini* case it was also stated (p. 724):

> "Under this law concealment and sale are distinct offenses, and therefore each act is punishable, although both occur in connection with a single transaction" (citing authorities).

An additional authority of this Court of Appeals sustaining the sufficiency of such an indictment as here challenged is *Pon Wing Quong v. United States,* 111 F. 2d 751 (C. A. 9, 1940), for on page 755 of the *Pon Wing* case, the same objection as now urged was considered:

> "But there is a further objection that, 'the second count fails to allege directly any knowledge on the part of said defendants * * * that said opium had been imported into the United States contrary to

> law', claiming that the phrase 'as said defendants then and there knew' is but a recital. There is no question but that in some instances this phrase would be held as a recital and not a sufficient allegation of fact, but we hold that this does not obtain in our case. The applicable part of the count is as follows: 'That at the time and place mentioned in the first count, in said Division and District, said defendants fraudulently and knowingly did facilitate the transportation of said lot of smoking opium, in quantity particularly described as 250 five tael cans containing approximately 1,665 ounces of smoking opium; and the said smoking opium had been imported into the United States of America contrary to law, *as said defendants then and there knew.*' (Italics supplied.)"

For additional authorities sustaining the sufficiency of indictments brought under kindred statutes dealing with narcotics see:

Rosenberg v. United States, 13 F. 2d 369 (C. A. 9, 1926);

Foster v. United States, 11 F. 2d 100 (C. A. 9, 1926);

Wong Lung Sing v. United States, 3 F. 2d 780 (C. A. 9, 1925).

Since the adoption of the New Rules, that is, the Federal Rules of Criminal Procedure, namely, Rule 7(c), it may well be said that virtually all of the cases that have construed the sufficiency of an indictment have established a premise or rule that: *The modern practice of the Federal Courts is to consider the adequacy of indictments on the basis of practical as opposed to technical consideration.*

As an illustration we refer to a relatively recent case of this Circuit Court, *United States v. Bickford*, 168 F. 2d 26 (C. A. 9, 1948). In the *Bickford* case the District Court had held a perjury indictment to be insufficient in that it did not directly aver that the officer administering the oath had competent authority to administer same. In reversing the District Court's holding and in declaring the indictment to be sufficient this Circuit commented that the Criminal Rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. The court discussed the purpose of an indictment and in quoting from the often referred to case of *Hagner v. United States,* said:

> "As observed in *Hagner v. United States, supra,* at page 433 of 285 U. S., at page 420 of S. Ct., 'it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

Without belaboring the point that the courts have become more liberal since the adoption of the New Rules effective March 21, 1946, we do, in passing, refer to a few more authorities to such effect. In a case tried in this district, namely, *United States v. Ochoa,* 167 F. 2d 341 (C. A. 9, 1948), where the death penalty was enacted, the Court of Appeals held that the omission in a murder charge of the phrase "with malice aforethought," as was provided in the statutory definition of murder (18 U. S. C. 452), was not bad. The court pointed out that the indictment in the *Ochoa* case was modeled after Form No. 1 in the Appendix to the Federal Rules of Criminal Procedure. The Ninth Circuit has repeatedly reaffirmed a liberal interpretation in construing indictments. See, *McCoy v. United States,* 169 F. 2d 776 (C. A. 9), in which case

the court pointed out that every particular relating to the charge is not required to be set out in the indictment. To like effect:

Flynn v. United States, 172 F. 2d 12 (C. A. 9, 1949).

A failure to allege that the alleged false statements were material, or to state to what person or agency or official of the United States, the false writing was submitted was not a basis for a motion to dismiss an indictment.

United States v. Varano, et al., 113 Fed. Supp. 867, D. C. Pa.).

An omission of a formal conclusion that the offenses charged were committed against the United States is not error.

United States v. Gicinto, 114 Fed. Supp. 204 (W. D. Mo., 1953).

II.

The Evidence Was Amply Sufficient to Sustain the Conviction.

As the case comes before this Court, the sole issue relating to the sufficiency of the proof is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." A verdict supported by sufficient evidence is binding on a reviewing court. (*United States v. Socony Vacuum Oil Co., Inc.,* 310 U. S. 150, 254 (C. A. 7); *Glasser v. United States,* 315 U. S. 60, 80 (C. A. 7) as follows:

> "It is not for us to weigh the evidence or to determine the cerdibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States v. Manton,*

107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' *United States v. Manton, supra.*"

Abrams v. United States, 250 U. S. 616, 619;

Orvis v. Higgins, 180 F. 2d 537, 539 (C. A. 2);

Stillman v. United States, 177 F. 2d 607 (C. A. 9);

McQuinn v. United States, 191 F. 2d 477 (C. A. D. C.);

Carlson v. United States, 187 F. 2d 366 (C. A. 10), cert. den. 341 U. S. 940.

We submit that the evidence which the jury believed not only amply supports, but in fact compels the verdict which the jury returned. The rule as stated in this circuit is noted in *Stillman v. United States,* 177 F. 2d 607 at p. 616:

". . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States,* 120 F. 2d 115 (C. A. 9), certiorari denied, 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503; *Henderson v. United States,* 143 F. 2d 681 (C. A. 9)."

The argument advanced by appellant overlooks the fact that possession of the narcotics need not be personal and actual but can be constructive. Furthermore, one who aids or assists in the commission of a crime is equally guilty and such principle of law was recognized by the trial court in the instructions given [R. pp. 269-270]. The Court gave the well recognized instruction: There are two kinds of possession "actual possession and constructive

possession" [R. p. 270] and that the possession may be "sole or joint."

The court likewise read from the statute pertaining to the aiding, abetting or procuring of the commission of a crime, namely, from Title 18 U. S. C., Sec. 2 [R. pp. 257, 258].

It is to be noted that Count Two charged the sale of forbidden heroin as of March 4, 1953. The evidence supports the conclusion that the appellant Brown received $600 for this particular heroin from the witness Stafford [R. p. 33] but that the delivery of the heroin was accomplished through "a man standing on the corner seated in another Cadillac". [R. p. 33]. It further is to the effect "that he (Brown) told me this man that was the party that wanted the heroin and for him to give it to me when I came back." [R. p. 33]. This same "man" is referred to in the record on pages 34, 35, and during the cross-examination on page 70. It is thus apparent that the appellant Brown was operating through a confederate who remained unidentified. Hence, not only did the sale, as involved in Count Two, implicate Brown but likewise the transportation as involved in Count Four of this same narcotics clearly implicated appellant Brown, despite the fact that Brown may not have actually had the exclusive physical possession of the narcotics involved.

The second sale was accomplished on March 13, 1953, and it involved the herein appellant Brown and another defendant Albert Hollins. As to this second sale, the same reasoning applies. It appears that the witness Stafford paid to the appellant Brown $600, whereupon Brown told "Al" (Hollins) and the witness Stafford to go sit in the car; within a few minutes thereafter two girls came along in an old grey Chevrolet and they handed a

package to Brown [R. p. 46]. Thereafter, appellant Brown walked to the car where "Al" (Hollins) was sitting and handed the package to "Al" and told "Al"—"to give me two of the parcels." After which Hollins delivered two of the parcels to the witness Stafford [R. p. 47]. It is thus seen in this second transaction that Brown accepted the money; that he initially received the package from the two girls and told "Al" Hollins to turn over two of the parcels to the witness Stafford. In other words, Brown had not only consummated the sale but he also had possession of the parcels that were ultimately delivered to the witness Stafford.

This Court, in the case of *Pon Wong Quong v. United States,* 111 F. 2d 751, p. 754 (C. A. 9, 1940), recognized that one may be guilty who aids and abets by recognized principles of law of constructive possession (pp. 756-757).

> "Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment."

And, again in the same case on page 758:

> "Possession of the opium as that expression is commonly understood is in neither case a requisite of guilt."

See also:

> *Borgfeldt v. United States,* 67 F. 2d 967 (C. C. A. 1933).

In the *Borgfeldt* case the court specifically stated that an instruction to the effect that the possession contemplated by the statute must be "personal and exclusive" was *not* correct, and that the Government need not show that the morphine was actually concealed by the defendant (see p. 969).

Another *narcotic* case to the same effect:

United States v. Cohen, 124 F. 2d 164 (C. C. A. 2d); cert. den. 315 U. S. 811 (*Bernstein v. United States*).

In the *Cohen* case, four defendants were convicted of concealing and facilitating concealment of morphine. The Court stated, on page 165, as follows:

> "The defendants were all convicted upon both counts and each has appealed. Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. United States v. Hodorowicz, 7 Cir., 105 F. 2d 218, 220, certiorari denied, 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; Vilson v. United States, 9 Cir., 61 F. 2d 901."

An additional *narcotic* case is:

Mullaney v. United States, 82 F. 2d 638 (C. C. A. 9th, 1936).

In the *Mullaney* case the Court, on page 642, discusses a charge with relation to accomplices, and points out that by reason of 18 U. S. C. A. 550 (now 18 U. S. C., Sec. 2), the distinction between principals and accessories has been abolished. On pages 642 and 643, in discussing instructions which are rather similar to the ones given in the instant case, the Court pointed out, particularly on page 642, that an instruction requiring that possession must be "personal and exclusive," was not correct.

III.

No Misconduct Was Committed by the Assistant United States Attorney.

Appellant contends that the Assistant United States Attorney was guilty of prejudicial misconduct. This contention pertains to an objection made to the offer of an impeaching witness who was offered to impeach the then deceased witness Frank Stafford. It should be observed that at no time during the trial did appellant specifically assign such alleged misconduct as error and no objections were made to preserve the record. It is submitted that the alleged misconduct is in fact not misconduct, but even though it were, it is not in the category of being plain error as is contemplated by Rule 52(b) of Federal Rules of Criminal Procedure.

It is submitted that the record clearly establishes the guilt of the appellant. This is not a case predicated upon speculative, uncertain or weak evidence. If any misconduct was perpetrated by the Assistant United States Attorney that fact should have been called to the Court's attention so that the error, if any, might be cured. One should not remain silent and raise the matter for the first time on appeal. The principle above announced of an obligation of counsel to timely object is noted in the following cases:

McQuaid v. United States, 198 F. 2d 987, 990, (C. A. D. C.), cert. den. 344 U. S. 929;

Alberty v. United States, 91 F. 2d 461, 464 (9th Cir., 1937).

The Assistant who tried the case on behalf of the Government was well aware of the salutary ruling announced in the excellent case of *Berger v. United States,* 295 U. S. 78 (1935). In the *Berger* case, the conduct of the repre-

sentative of the Government was to put it mild, grossly objectionable and was properly recognized by the Supreme Court as being such. However, on page 89 of the *Berger* case we find the following language:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

The *objection* imposed by the Assistant United States Attorney, to the offer of evidence seeking to impeach the credibility of the deceased witness Stafford upon the ground that no effort had been made to impeach his testimony during his life time, while not constituting a proper objection to the offer of such impeaching testimony, can still not be said to have been made in bad faith. Appellant's (Brown's) counsel made no objection to such observation. In fact the observation was supported by the previous record. However, such does not indicate that it was made in bad faith. We have carefully reread the other specific questions that have on pages 10 and 11 of Appellant's Opening Brief been assigned as misconduct. Suffice it to say that no objections were made to such questions.

At the trial, Brown was endeavoring to discredit, as unreliable, the testimony of the then deceased witness Stafford. As we have reread the cross-examination, it would appear that the prosecutor unwittingly permitted the impeaching witnesses to bolster the contention of the defense of the possible unsavory repute of the witness Stafford, as such witnesses were quick to refer to

specific facts that they felt supported their opinion that the reputation of the deceased witness Stafford for truthfulness was bad.

The jury, apparently, concluded that the testimony of the witness Stafford was not only believable, but was fully corroborated by the testimony of the various Government Agents.

It is rather unsual to note that the impeaching witness Ben Ayers conceded that he had been subpoenaed at the first trial, but still did not testify [R. p. 220], and that he was available for the first trial and was asked to be a witness by appellant Brown's attorney but still did not testify [R. pp. 222-224].

It is interesting to note that this court, as recently as of September, 1954, affirmed a narcotic conviction where this same witness Stafford also had made the heroin purchases and where, in such case, the defendant urged that Stafford was a disreputable character that should not be believed. We refer to:

> *Henry v. United States,* 215 F. 2d 639 (C. A. 9, 1954).

It should be recalled that the impeaching witnesses testified that the reputation of the deceased witness Stafford for truth and honesty was bad. Obviously, in the discretion of the trial court, reasonable latitude should be permitted upon cross-examination to show the witness' knowledge or lack of same as to the reputation of the person involved, as to his bias, or prejudice, as to whether he or she is expressing his or her personal opinion or that expressed by the community, the surroundings of the witness, and interest in the case, or that his testimony is inherently improbable. Even the going into collateral mat-

ters is not improper where it bears a reasonably clear relationship to the subject matter that the witness has testified to. It is true no witness should be taunted, degraded, or unduly embarrassed, but such is not the case here. The right of cross-examination is a matter of right, to place a witness in his proper setting. This the Supreme Court said in *Alford v. United States,* 282 U. S. 687.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensures from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . ."

To like effect see:

> *United States v. Edmonds,* 63 Fed. Supp. 968 (D. C. Dist. Col., 1946), at page 973.

An illustration of where alleged improper cross-examination was held to not be error is the case of *United States v. Weiss,* 103 F. 2d 348 (2d Cir., 1939), at pp. 354, 355.

The Supreme Court in the case of *Michelson v. United States,* 335 U. S. 469, in an Encyclopedic Opinion written by the late Justice Jackson points out the latitude that is permitted in cross-examining a character witness who endeavored to bolster the character or reputation of a defendant. If this be good law, which it appears to be, certainly similar latitude should be allowed in cross-examining an impeaching witness.

An excellent discussion of the extent that should be allowed in cross-examination is noted in the case of *United States v. Lawinski,* 195 F. 2d 1 (C. A. 7, 1952), at page 7:

> "The rule in federal courts governing the proper scope of cross-examination has never been more simply stated than by Mr. Justice Story in Philadelphia & T. Ry. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535; in these words: 'A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination.' . . .
>
> "Legal history has proved that the rule is conducive 'to the systematic and orderly trial of causes.' 5 Jones on Evidence 4579. However, a well known exception to the rule is recognized, and that is that collateral matters may be gone into on cross-examination to a limited extent for the purpose of testing the witness' credibility. Thus, inquiries may properly be directed to the witness' interest, his motives, his prejudices or hostilities, his means for obtaining knowledge of the fact, his power of memory, his way of life, his associations and to any pertinent circumstances affecting his credibility. Within this exception also lie certain methods of impeachment, such as his statements contrary to his direct testimony, and convictions for crime.
>
> "These relaxations of the general rule governing the proper scope of cross-examination, however, obviously cannot be defined with certainty to fit all occasions; their extent and limitations will depend upon the particular facts and circumstances of the case on trial. Generally, therefore, it is recognized that determination of where those limitations lie is within the sound discretion of the trial court. It is for the presiding judge to exercise a wise discretion in

> determining whether, considering the examination in chief, it is fit and proper that the questions presented be permitted or excluded. Storm v. U. S., 94 U. S. 76, 24 L. Ed. 42 . . ."

As we have heretofore stated, to preserve a matter on appeal, even as to improper cross-examination, an objection should have been made so as to accord the Court a chance to correct the error.

> *Salerno v. United States,* 61 F. 2d 419, 424 (C. A. 8th, 1932);
>
> *Panzich v. United States,* 65 F. 2d 550, 552 (C. A. 9th, 1933).

We refer to an often quoted case of the Supreme Court covering the subject matter of failing to object to alleged impropriety.

> *United States v. Socony Vacuum Oil Company,* 310 U. S. 150.

Wherein the Supreme Court reversed the action of the Appellate Court and sustained the conviction of the District Court. There is a rather full treatment of this proposition of law commencing at page 237 to and including page 243, as we quote:

Pages 238-239:

> "In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial. See Crumpton v. United States, 138 U. S. 361, 364."

Page 243:

> "As stated in Dunlop v. United States, 165 U. S. 486, 498, 'If every remark made by counsel outside of the testimony were ground for a reversal comparatively few verdicts would stand.'"

It is well settled in this Circuit that exception to argument of counsel without more, does not raise a question of law. We cite the case of:

> *McDonough, et al. v. United States,* 299 Fed. 30 (9th Cir., pp. 38-39).

The Courts have generally held that where no objection was made to remarks made by the prosecutor in his closing arguments the question of the impropriety of such remarks has not been preserved for review.

> *Allen v. United States,* 192 F. 2d 570 (C. A. 5, 1951).

To like effect:

> *Heald v. United States,* 175 F. 2d 878, 882 (C. A. 10th, 1949);
>
> *Vendetti v. United States,* 45 F. 2d 543 (C. A. 9th, 1930);
>
> *Pacman v. United States,* 144 F. 2d 562 (C. A. 9th, 1944).

IV.

There Was No Error Committed in Any of the Instructions.

On page 12 of Appellant's Opening Brief a portion of the Court's instruction is set forth and urged as being erroneous. As stated, only a portion of the instruction has been set forth. To get a proper conception of this phase of the charge one should read the entire instruction upon this subject, which is reflected on page 258 of the Reporter's Typewritten Transcript where the Court gave the instruction pertaining to causing, aiding, and abetting, etc., as is provided for by 18 U. S. C., Section 2, and the remainder of the instruction given on this subject.

It should be noted that counsel made no objection to the instructions given [R. p. 277]. In fact, prior to giving the instructions, when the Court specifically asked if there were any suggestions or objections to the proposed instructions, counsel replied:

> "Mr. Gordon: No, Your Honor, there is none." [R. p. 250.]

And, later stated that he was satisfied with the instructions the Court proposed to give [R. p. 250].

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure error cannot be assigned unless an objection has been made. Late Opinions enunciating the rule that normally speaking an objection should be urged at the trial, and the grounds stated as to the instructions proposed, or to the fact that such instructions omit essential

elements and in the absence thereof no preservation of error is had for the reviewing court, are the following:

Kobey v. United States, 208 F. 2d 583, p. 588 (C. A. 9th, 1953);

Enriquez v. United States, 188 F. 2d 313, p. 316 (C. A. 9th, 1951);

Cosenza v. United States, 195 F. 2d 177 (C. A. 9th, 1952).

V.

The Sentence, While Severe, Was Not Arbitrary and Was Within the Limits Provided For By Law.

It is true that the Court imposed the maximum sentence on each count. The record reveals that this is an admitted second conviction of the defendant for similar such narcotic offense [R. pp. 292-293]. The statute permits the maximum of ten years on each count for a second offender. Congress and other legislative bodies have of late seen fit to increase the punishment of those dealing in illicit drugs.

A sentence of a defendant in a narcotic case, to a total of *52* years, while severe is neither cruel nor unusual in a constitutional sense, but is in kind that which is usually visited by law, and since it does not exceed that permitted by statute the Appellate Court is without power to relieve from such sentence.

Ginsberg v. United States, 96 F. 2d 433, p. 437 (C. A. 5th, 1938).

A sentence within the limits of an applicable statute will not be reviewed by a Court of Appeals.

Smith v. United States, 214 F. 2d 305, 311 (C. A. 6th, 1954).

A sentence of a second offender on a federal narcotic charge, within the limits allowed by statute may not be modified by the Court of Appeals.

United States v. Kapsalis, 214 F. 2d 677, 683-684 (C. A. 7th, 1954).

That such a sentence, or separate sales of narcotics constituted distinct offenses is well settled.

King v. United States, 214 F. 2d 713 (C. A. 10th, 1954).

That the various counts involved here contain a different element to each other and necessitated proof of a fact not essential to the other is fully settled; such being so a consecutive sentence could lawfully be imposed on each separate count.

United States v. Hardgrove, 214 F. 2d 673 (C. A. 7th, 1954).

A District Court imposing a sentence authorized by law commits no error, and the Appellate Court should not concern itself with such sentence.

Holmes v. United States, 134 F. 2d 125, p. 135 (C. A. 8th, 1943), cert. den. 319 U. S. 776.

To like effect:

Kawakita v. United States, 190 F. 2d 506 (C. A. 9th, 1951), affirmed 343 U. S. 717, p. 745 (a sentence of death for treason);

United States v. Sorcey, 151 F. 2d 899, p. 902 (C. A. 7th, 1945);

United States v. Rosenberg, 195 F. 2d 583, p. 603 (C. A. 2d), cert. den. 344 U. S. 838;

Cosenza v. United States, 195 F. 2d 177, 178 (C. A. 9th, 1952).

A "harsh" sentence based upon the contention of "war hysteria" does not justify setting aside the discretion imposed in the trial court.

Shaw v. United States, 151 F. 2d 967, p. 971 (C. A. 6th, 1945).

Conclusion.

It is respectfully submitted that the Judgment should be affirmed and in nowise modified.

Respectfully submitted,

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LOUIS LEE ABBOTT,
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Assistant U. S. Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 14543

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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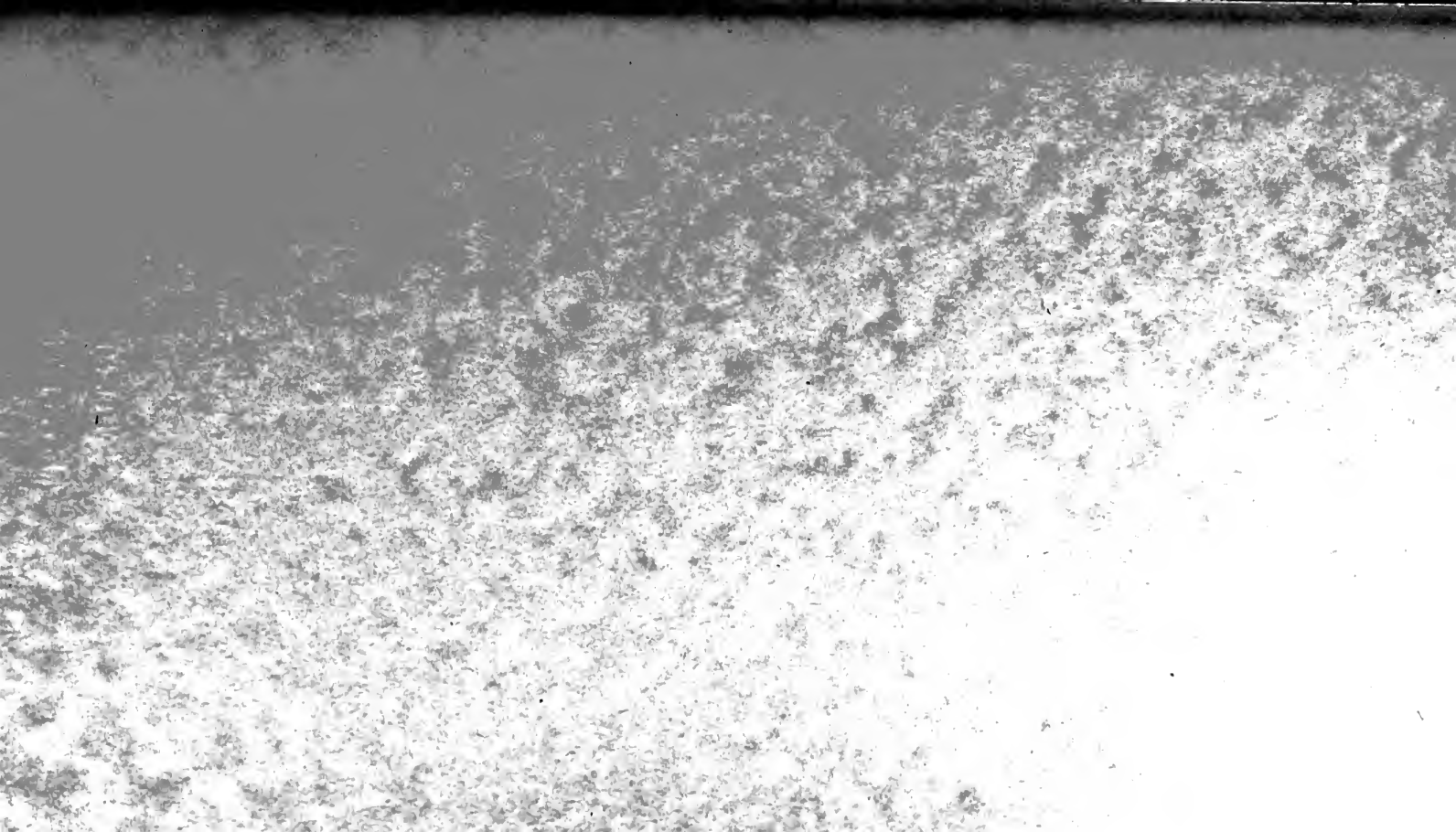

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 14543

IN THE

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UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

Error in Failing to Dismiss Indictment.

It is the contention of Appellant that the indictment failed to state a public offense and should therefore have been dismissed.

Count Two charges that defendant did, *after importation,* knowingly and unlawfully sell to Frank Stafford a certain narcotic drug, which said heroin, as the defendant then and there well knew, had been imported into the United States of America contrary to law.

Counts Three, Four and Five charge in similar language Title 21, United States Code Sec. 174 reads in part as follows:

> "Whoever *fraudulently or knowingly imports* or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any *such narcotic drug* after being imported or brought in, *knowing the same to have been imported contrary to law, etc.*" (Emphasized.)

This statute requires, not only that the narcotic had been illegally imported into this country contrary to law, but also stipulates a further provision that the importation must be *knowingly or fraudulently* imported *contrary to law.*

In the present indictment, there should be an allegation that James Boyd Brown did sell or facilitate the transportation of a narcotic which;

1. Had been *knowingly or fraudulently* imported into the United States; and,

2. That said defendant knew that said narcotic had been *knowingly and fraudulently* imported into this country *contrary to law.*

The indictment in the instant case fails to allege that the narcotic was *knowingly or fraudulently* imported contrary to law.

It might here be pointed out that the indictment charges that the defendant did, *after importation,* knowingly and unlawfully sell etc. The indictment is devoid of any allegation that the narcotic was *knowingly or fraudulently* imported. This is a necessary ingredient of the offense.

If the narcotics were not knowingly or fraudulently imported, then no effense has been committed. That is, if the narcotics were not knowingly or fraudulently imported. The mere fact that it is alleged that defendant knowingly and unlawfully sold the narcotics, knowing them to have been imported "contrary to law" is not sufficient. In other words, the narcotics could have been imported "contrary to law" and not "knowingly or fraudulently imported contrary to law." The statute refers to *such narcotic drug,* meaning one that has been knowingly and fraudulently imported.

The presumption that narcotics drugs found in the United States have been imported contrary to law is rebuttable and covers a necessary element of the crime, and hence *illegal importation* must be alleged in indictment.

Pon Wing Quong v. United States, 111 Fed. 2d 751.

With respects to the other points involved Appellant will argue the same at the time set for the oral argument.

Respectfully submitted,

WALTER L. GORDON, JR.,
Attorney for Appellant.

No. 14545

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECIL REGINALD JAY,

Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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BALLARD NEWS, SEATTLE, WASHINGTON — 2/25/55 — 45 COPIES

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INDEX

TABLE OF CASES

STATUTES

REGULATION

TEXT

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by Section 2241, Title 28, U.S.C. and on this Court by Section 2253, Title 28, U.S.C.

STATUTE INVOLVED

The statute involved is Section 244 of the Immigration and Nationality Act of 1952, Title 8, U.S.C.

1254, 66 Stat. 214. This statute is set forth in pertinent detail on page 3 of appellant's brief.

REGULATION INVOLVED

Title 8 C.F.R. Sec. 244.3, in pertinent part, is as follows:

> In the case of an alien qualified for suspension of deportation under Sec. 244 * * * the determination as to whether the application for suspension of deportation shall be granted or denied * * * may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT OF THE CASE

Appellant, a native of England, last entered the United States in 1921. In 1949 he was arrested for deportation and during the course of deportation hearings in December, 1950, the Government charged that appellant was deportable by virtue of Section 22 of the newly enacted Internal Security Act of 1950, which provides for the deportation of aliens who since such entry, have become members of the Communist Party of the United States. At this hearing appellant admitted membership during the period from 1935 to 1940. On April 16, 1951 he was found

deportable and the Board of Immigration Appeals affirmed on December 5, 1952.

A petition for a writ of habeas corpus, attacking the deportation order was denied by the District Court, March 10, 1953. Thereafter appellant applied for a suspension of deportation under 8 U.S.C.A. 1254 (a) (5). After hearing, appellant was found statutorily eligible, however the hearing officer exercising his discretionary power under the statute denied appellant's application, stating in part, "However, after considering confidential information relating to the respondent as provided for under 8 C.F.R. 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied."

On April 9, 1954 appellant's appeal to the Board of Immigration Appeals was dismissed, and on July 14, 1954 the District Court denied appellant's petition and application for writ of habeas corpus attacking the denial of discretionary relief. Appellant has appealed from that order to this court.

QUESTIONS PRESENTED

Is Congress foreclosed from deporting an alien on statutory grounds adopted subsequent to his entry?

II

When an official, exercising the statutory discretion to suspend deportation, utilizes confidential information must he make a finding of its nature in exactly the terms of the applicable regulation?

SUMMARY OF ARGUMENT

Appellant argues that he cannot be constitutionally deported for a reason or on grounds which were not a condition of his entry. This is not a new argument and has been rejected by the Supreme Court in a long line of decisions beginning with the *Chinese Exclusion Case*, 130 U.S. 581 and continuing to the recent case of *Galvan v. Press*, 347 U.S. 522. Appellee is content to rest this portion of the argument on that line of cases.

The remainder of appellant's brief treats of the alleged denials of due process implicit in the handling of confidential information by the special inquiry officer and the Board of Immigration Appeals, in connection with the refusal of appellant's application for discretionary relief. It is charged specifically that the so-called confidential information is not confidential in nature; and further, that even if it is confidential, that no recital of the fact that its disclosure would be prejudicial to the public interest, safety or security was made.

It is well settled that the Attorney General or his representative may consider confidential information in the exercise of his discretion to suspend deportation. Title 8 C.F.R. 244.3 was designed to establish a basis for the use of confidential information by the delegatee. In the present proceedings the regulation was followed in detail by the special inquiry officer inasmuch as he specifically incorporated the regulation by reference.

Appellants attempt to prove below that the information was not confidential was an impossible task because only by the wildest speculation could appellant hope to define what could not even be revealed to the Court.

Perhaps it is harsh to suggest that appellant could not be injured or prejudiced even assuming the truth of his alleged requirement that an exact finding was necessary; however, the plain truth is that the Court, much less the appellant cannot have the privilege of considering information found confidential by officials of the executive branch.

Basic, however, to all arguments concerning the administration of discretionary relief, is the necessary consideration of the nature of the relief requested. The alien has been found deportable in a separate proceeding, and is now asking for an act of grace which

will be granted or withheld according to the considered opinion of the delegatee. Clearly a court ought not to interfere in the absence of obvious unfairness.

ARGUMENT

I

May the appellant be deported for a cause which was not made a condition at the time of his entry into the United States?

The appellant contends deportation under such circumstances is without constitutional sanction; that the question has never been clearly analyzed by the Supreme Court; that it has been assumed that the power to provide for the removal of aliens is a broad general power arising out of sovereignty. The appellant's theory has its origin in the dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting v. The United States*, 149 U.S. 698, 732, 737 (1892). A majority of the court rejected the doctrine approved by Mr. Justice Brewer, and the Supreme Court in an unbroken chain of decisions from that time until the present has rejected any attempt to place a limitation upon the sovereign in dealing with aliens. The plenary power of Congress has been time and again sustained by the Supreme Court.

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 511, 96 L.Ed., 586.

Mr. Justice Jackson dissenting in *Shaughnessy v. The United States*, 345 U.S. 206, 222, 73 S.Ct. 634, 97 L.Ed. ..... discussing substantive due process, at page 222, stated:

> "Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government."

More recently in *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911, the plenary power of Congress was again reviewed by the Supreme Court, two members dissenting. Mr. Justice Frankfurter, speaking for the majority, said:

> "As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

The wisdom of this conclusion is obvious as to hold otherwise would limit the sovereign power of the Unit-

ed States to deal with aliens in our midst who are dedicated in the destruction of our form of government.

II

Was the appellant denied procedural due process of law?

The appellant asserts that he was denied procedural due process of law because the special inquiry officer and the Board of Immigration Appeals did not expressly state in writing that they found the confidential information upon which they relied to deny discretionary relief to be of such a nature that disclosure would be projudicial to the public interest, safety, or security. It is the position of the government that the special inquiry officer and the Board of Immigration Appeals each found and were of the opinion that the confidential information, if disclosed, would be prejudicial to the public interest, safety, or security, and that they did so in a manner consistent with the statute, regulations, and the requirements of the procedural due process. The area of controversy seems to be limited to the manner in which the special inquiry officer and the Board of Immigration Appeals manifested its opinion in this respect. The statute is silent concerning any finding which the appellant asserts due process requires, providing merely,

> "As hereinafter prescribed in this section, the Attorney General may in his discretion suspend deportation * * *," Section 244(a), Immigration and Nationality Act of 1952, 66 Stat. 214 (8 U.S.C.A. 1254).

The regulations do not provide for any finding that the disclosure of such information would be prejudicial to the public interest in the sense that the appellant asserts (8 C.F.R. 244.3, and 17 F.R. 11517 of December 19, 1952), but merely provides that confidential information does not have to be disclosed where the officer or the Board is of the opinion that it would be prejudicial to the public interest, safety, or security. The District Court found, as a matter of law, that this regulation should not be construed to impose implied conditions or restrictions upon the Board or the special inquiry officer (Record, p. 18). Both the special inquiry officer and the Board indicated in their written opinions that they were relying on confidential information, the nature of which was described by the above regulation. The special inquiry officer, in his opinion, stated specifically that he was denying suspension,

> "After considering confidential information relating to the respondent, as provided for under 8 C.F.R. 244.3." (Record 16).

The Board of Immigration Appeals, after reviewing the record of hearing, and the decision of the special inquiry officer, stated:

> "Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief." (R. 17).

It is plain that the hearing officer did form an opinion that the nature of the confidential information was such that disclosure would be prejudicial to the public interest. The word "finding" is not used in the regulation. Therefore, the failure to use the specific language, in the opinion of the hearing officer, could not be regarded as a violation of the regulation.

Where the hearing officer stated that he is acting pursuant to such regulation, requiring the exercise of his judgment and the formulation of his opinion, it is presumed that he is performing his duties in accordance with the regulation in the absence of a contrary showing.

> *Cunard SS. Co. v. Elting*, 97 F. 2d 373, C.C.A. 2-1938 (18 A.L.R. 2d 625).

When the Board of Immigration Appeals adopted this opinion, it is presumed that they were acting in the same manner.

The finding such as the appellant claims should have been made in order to satisfy the requirements of due process would not have contributed to the essential fairness of the hearing because, regardless of what language might have been used in order to indicate compliance with the regulation, the appellant still would have been foreclosed from further inquiry because of the confidential nature of the information. The appellant does not contend that he was denied due process because such confidential information was used. Further, whether or not the confidential information was of such a nature as to be prejudicial to the public interest was not a matter which was the subject of adjudication in the sense that a finding was required to be made after definite issues of law and fact had been tried at a hearing *(Dolenz v. Shaughnessy,* 206 F. 2d 392), it was a collateral matter concerned primarily with the exercise of discretion and not within the broad general rule prohibiting the consideration of matters outside the record 18 A.L.R. 2d 571, 586, Sec. 14.

Judge Learned Hand considering a similar question in *U. S. ex rel Kaloudis v. Shaughnessy,* 180 F. 2d, 489, C.A. 2, 1950. In this case the Board refused to grant suspension because the alien was a member of an organization appearing on the proscribed list issued by the Attorney General, The International

Workers Order. The alien contended that unless he was granted a hearing to determine whether the Attorney General had adequate grounds for proscribing the organization, he would be denied due process of law. The court held that the alien had no constitutional right to such a hearing and that any legally protected interest he had, had been forfeited by due process of law, reasoning that the only legally protective interest or right he had related to the hearing to determine deportability and the hearing to determine eligibility under the statute for suspension of deportation. More recently, in *United States v. Mackey*, 210 F. 2d 160, C.A. 2, 1954, Cert den., 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. ..... the Second Circuit amplified this distinction between the use of confidential information in determining statutory eligibility for suspension and the use of such information for its bearing on the formulation of a discretionary decision. The Second Circuit here follows the Kaloudis case where Judge Hand pointed out that the power of the Attorney General to suspend deportation was a dispensing power, a matter of grace over which the courts had no review, and that the alien had no legally protected right to a hearing as to the adequacy of the Attorney General's reasons for denying suspension in the exercise of discretion.

CONCLUSION

For the foregoing reasons it is respectfully urged that the decision of the court below be affirmed.

CHARLES P. MORIARTY
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F. N. CUSHMAN
Assistant United States Attorney

JOHN W. KEANE
Attorney, Immigration and Naturalization Service

No. 14546

United States
Court of Appeals
for the Ninth Circuit.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California,

Appellant,

vs.

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-31-54

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States in and for the Southern District of California, Central Division

No. 16866 PH

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of Los Angeles, State of California, and DOE I Through DOE X,

Defendants.

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF

Comes Now the Plaintiff and Complains of Defendants and Each of Them and for First Cause of Action Alleges:

I.

That this action arises under 39 United States Code, Sections 255 and 259A; 28 United States Code, Sections 2201 and 2202; 5 United States Code, Sections 1001, et seq., and Articles I, IV, V, VI, VII and VIII of Amendments to the Constitution of the United States.

II.

That at all times herein mentioned defendant, Otto K. Olesen, was and is the duly appointed, qualified and acting Postmaster of the City of Los Angeles, State of California. [2*] That in his ca-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

pacity as Postmaster he is charged with the duties of administrating and managing the United States Post Office in and for said City, and is in charge of and responsible for the receipt and distribution of material sent through the United States mails for delivery in and from said City.

III.

That the defendants, Doe I through Doe X, are sued herein under a fictitious name for the reason that their true names and capacities are unknown to plaintiff at this time.

IV.

That plaintiff, V. E. Stanard, has heretofore been engaged in the business of distributing and selling through the mail certain publications, pin-up pictures and novelties under the firm name and style of Male Merchandise Mart. That plaintiff has duly published and recorded with the office of the County Clerk of the County of Los Angeles, State of California, a Certificate of fictitious firm name in accordance with the provisions Section 2466 of the Civil Code of the State of California.

V.

That on March 1, 1954, the Solicitor for the Post Office Department issued a complaint against plaintiff charging that she was carrying on, by means of the Post Office, a scheme for obtaining money for articles of obscene character.

VI.

Plaintiff answered the complaint and denied the charge; a hearing was held in Washington; pro-

posed findings of fact and conclusions of law were submitted by the plaintiff and the Solicitor of the Post Office Department.

VII.

On April 30, 1954, the Hearing Examiner filed his initial [3] decision and found that plaintiff was selling or attempting to sell obscene books, motion pictures, playing cards and the other items mentioned in the complaint. A copy of this decision is attached hereto as Exhibit "A," and by this reference incorporated herein.

VIII.

That none of the books, motion picture films, playing cards, color slides or other items described in the complaint were offered in evidence and the Hearing Examiner reached his conclusion that they were obscene without having seen the said material.

IX.

That subsequent to the issuance of the initial decision of the Hearing Examiner, plaintiff filed her appeal from the initial decision and her exceptions.

X.

That on June 11, 1954, the Solicitor filed his brief in opposition to plaintiff and on the same day the Deputy Postmaster General, Charles R. Hook, Jr., issued the decision affirming and adopting the initial decision of the Hearing Examiner. On the same day the Deputy Postmaster General issued an order addressed to defendant, Otto E. Olesen, directing him to return to the sender all mail matter ad-

dressed to plaintiff with the word "unlawful" written or stamped on the outside thereof.

XI.

That none of the materials sold or offered for sale by plaintiff is obscene, lewd, lascivious or indecent; that the material sold or offered for sale by plaintiff is mailable matter.

XII.

Unless restrained by this Court, the defendants will return to the sender all mail addressed to the plaintiff, with [4] the word "unlawful" stamped thereon; that said action will cause plaintiff irreparable loss and damage.

XIII.

That the order of the Deputy Postmaster General is a final order and plaintiff has no other adequate remedy available.

XIV.

That an actual controversy exists between plaintiff and defendants within the jurisdiction of this Court and this Court should declare the rights and other legal relations between the parties hereto.

XV.

That the said order of the Deputy Postmaster General is void and in violation of plaintiff's constitutional rights:

A. The order is unsupported by substantial evidence;

B. The order is arbitrary, capricious and an abuse of discretion, and not in accordance with law;

C. The order is violative of plaintiff's Constitutional rights guaranteed by Articles I, IV, V, VI, VII and VIII of the Amendments to the Constitution of the United States;

D. The statute under which the order was issued is unconstitutional on its face and as applied.

As and for a Separate and Distinct Cause of Action, Plaintiff Alleges as Follows:

I.

That paragraphs I, II, III, IV, V and XIV of the first cause of action are realleged as though the same were herein and fully set forth.

II.

That on March 1, 1954, without notice or hearing and before there had been any determination of illegal activity on the part of plaintiff, defendants, and each of them, under orders of the Deputy Postmaster General, impounded and refused to deliver to plaintiff any mail addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California. [5]

III.

That although no final order averse to plaintiff was issued until June 11, 1954, defendants continued to refuse to deliver to plaintiff her mail addressed to Male Merchandise Mart as aforesaid and still

continues to refuse to deliver the said mail received by the defendants prior to June 11, 1954.

IV.

That on March 19, 1954, plaintiff filed an action in this Court, No. 16522-HW, to enjoin defendants from impounding plaintiff's mail without notice or hearing and before there had been any final determination of illegal activity. The Honorable Harry C. Westover dismissed the said Complaint on the ground that he had no jurisdiction of the matter since administrative proceedings were still pending. Plaintiff has appealed the said judgment of dismissal and the case is now pending in the Circuit Court of Appeals for the Ninth Circuit. Plaintiff made motions to the Circuit Court of Appeals and to Mr. Justice Douglas for relief pending appeal but neither of these motions were granted.

V.

The plaintiff's mail was withheld under the impound order for an unreasonable length of time.

VI.

Unless defendants and each of them are enjoined and restrained from continuing to hold plaintiff's mail and are ordered by this Court to release to plaintiff all such mail impounded prior to June 11, 1954, plaintiff will continue to be irreparably damaged.

VII.

That the said impound order is invalid for the following reasons:

a. There is no authority in law, express or implied, for the issuance of such an order. [6]

b. It violates the due process clause of the Fifth and Sixth Amendments in that it inflicts punishment upon plaintiff without due process of law.

c. It is in violation of the Administrative Procedure Act which requires a hearing and findings prior to imposition of sanctions.

d. It is in violation of the First Amendment of the United States Constitution as a prior restraint on communication. [7]

VIII.

That as a direct and proximate result of the defendants' withholding of plaintiff's mail pursuant to the invalid impound order, plaintiff has suffered damages in the sum of Twenty-five Thousand Dollars ($25,000.00).

Wherefore, plaintiff, V. E. Stanard, prays judgment against the defendants and each of them as follows:

1. For a temporary restraining order, preliminary and permanent injunction directed to the defendants herein and each of them ordering said defendants and each of them to forthwith deliver up to plaintiff all mail matter of any kind or nature addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and enjoining the defendants and each of them from, in any manner, failing or refusing to deliver in the regular course of mailing any and all mail matter

addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and from in any manner carrying out or enforcing the final order of the Deputy Postmaster General, dated June 11, 1954.

2. For a temporary restraining order, Preliminary and permanent injunction directed to the defendants herein and each of them, ordering said defendants to forthwith deliver up to plaintiff all mail matter of any kind or nature addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, withheld by said defendants prior to June 11, 1954, the date of the final administrative order.

3. For a declaration by this Court that:

A. The impound order of March 1, 1954, is invalid;

B. The final order of June 11, 1954, is invalid.

4. For damages in the sum of Twenty-five Thousand Dollars ($25,000.00).

5. For costs of suit incurred herein and for such other [8] and further relief as to the Court may seem just and proper.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff. [9]

EXHIBIT A

Office of the Deputy Postmaster General
Division of Hearing Examiners
Post Office Department
Washington 25, D. C.

H. E. Docket No. 2/292

April 30, 1954.

In the Matter of the Complaint That:

ALBERT J. AMATEAU, and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART, and MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, and RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Sections 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

INITIAL DECISION OF
HEARING EXAMINER

Duplicate copies of the complaint and notice of hearing were served on V. E. Stanard and Albert

Exhibit A—(Continued)

J. Amateau on March 3, 1954, in the manner provided by the Rules of Practice. Coincident with the issuance of the complaint and notice of hearing the Deputy Postmaster General, by order dated March 1, 1954, instructed the postmaster at Los Angeles, California, to withhold from delivery mail addressed to Male Merchandise Mart, Michael Malone and Rarepix Co. until the identity of the party or parties claiming it, and the character of the business being conducted under those names, were established upon evidence to be received at the hearing. To the complaint Albert J. Amateau filed a reply in which he disclaimed under oath [10] any connection whatever with V. E. Stanard, Male Merchandise Mart and Rarepix Co., and with the operation under those names of the business which constitutes the subject matter of the complaint. Amateau's reply further asserts that he "does not interpose any objection to the denial of the mail privileges" to the other names contained in the complaint, "except that he respectfully pleads that his name be disconnected and expunged from these proceedings." The Respondent, V. E. Stanard, filed answer in behalf of herself, Male Merchandise Mart and Michael Malone.

The hearing date was originally set for March 17, 1954. The date was moved forward, however, to accommodate Los Angeles counsel for Respondent Stanard, to March 10, 1954. At that time counsel moved for and was granted a severance of his client from Respondent Amateau and Rarepix Co. On the

Exhibit A—(Continued)

last mentioned date the hearing with respect to Respondent Stanard was conducted before me, with the understanding that for procedural purposes the hearing would be deemed as having been held on March 17, 1954. No further answer to the complaint was filed by Respondent Amateau or Rarepix Co., and no one representing Amateau or Rarepix Co. appeared on March 17, 1954. Proposed findings of fact and conclusions of law have been filed by the Solicitor and Respondent Stanard. The entire official record has been considered by me in reaching this decision.

The enterprise alleged to be in violation of the statutes invoked is averred in the complaint to be in substance the conduct through the mails by Stanard and Amateau, using the fictitious, false or assumed names Male Merchandise Mart, Michael Malone and Rarepix Co., of an unlawful enterprise involving the obtaining or attempted obtaining of remittances of money through the mails for certain articles of an obscene, lewd, lascivious, indecent, filthy and vile character, consisting of books, photographs, motion pictures, playing cards, color slides and novelties, and the giving by mail of information as to where, how and from whom these articles may [11] be obtained, in violation of the statutes invoked.

Attached to the complaint as an exhibit thereto are photostatic copies of circulars alleged to have been mailed by these Respondents, advertising of circulars alleged to have been mailed by these Re-

Exhibit A—(Continued)

spondents, advertising and offering for sale items bearing such captions and titles as: "Most Amazing Offer of Uncensored Books That Dare to Tell the Truth," "Rare Specials," "Naughty Bed-Time Books," "Books on Every Angle of Sex," "Are Ordinary Novels Too Tame for You? Here's Exciting, Intimate Reading That Gives You That Thrill! Pocket-Size Editions," "Sex in Prison," "Wild French Cartoons," "The Flimsey Report," "Racy, Risky Assortment of French Love Stories," "Wow!" "Wolf Deck," "Real Old-Time Cartoon Books," "A Cigarette Pack Peep Show," "A Pocket Art Museum," "Party Films," "To Spank or Not to Spank," "A Pack of Beauty," "Art Slides," "Body in Art," "3rd Dimension Slides" and "Beauty in Bondage." The complaint further charges that Respondents' advertising circulars contain illustrations and descriptive statements which characterize the various items offered for sale as being erotically and sexually stimulating, and, hence, as being obscene, lewd, lascivious and indecent.

The answer filed by Respondent Stanard in substance denies the charge of offering obscenity for sale. The answer also contends that the statute pursuant to which the Solicitor recommends the issuance of the order authorized thereby, to wit, Title 39 U.S. Code, Section 259a, is invalid and void as being in conflict with the Constitution of the United States. The question of constitutionality is not one for decision here (Engineers Public Service Co. v. Securities Exchange Commission, 138 F. (2d) 936).

Exhibit A—(Continued)

By stipulation at the hearing on March 10, 1954, supported by evidence received from the Respondent, it is established that V. E. (Violet Evelyn) Stanard is an actual individual and a person who owns, operates and does business as Male Merchandise Mart, and that the name, Male Merchandise Mart, is a fictitious firm name filed as such [12] with the County Clerk of the County of Los Angeles on February 15, 1954, pursuant to the applicable statutes of the State of California (Tr. 3, 4, 15-18). The identity of "Michael Malone," if there be such a person, is not clear. However, that name is used in Respondent Stanard's advertising circulars.

Post Office Inspectors H. J. Simon and C. E. Dunbar appeared as witnesses for the Solicitor. They identified and there were received in evidence a number of circulars soliciting remittances for the items hereinbefore mentioned to be mailed to Male Merchandise Mart (Dept. Exhibits 1-A through 1-P and 2-A through 2-I). The inspectors testified that these circulars were received through the mails addressed to various test names used by them in official investigations.

Included within this decision as pages 5, 6, 7 and 8 are photostatic copies of these advertising circulars. None of the books, motion picture films, playing cards, color slides and other items described in the circulars and mentioned in the complaint were offered in evidence. However, as explained by counsel for the Solicitor at the hearing, and as further

Exhibit A—(Continued)

elaborated upon in the Solicitor's proposed findings and conclusions, it is his position that the illustrations and language employed by Respondent in the advertising circulars to describe these wares are such as to leave no doubt that the materials offered for sale are lustfully stimulating and that the addressees of the circulars are being solicited to purchase books, pictures, films and novelties which are obscene, lewd, lascivious, indecent and filthy; and that under these circumstances, the presence of these items themselves in evidence is not necessary.

Examination of the contents of these circulars constrains me to adopt the Solicitor's proposed findings to this effect. There can be no doubt whatever that the voluptuous and provocative illustrations and textual matter appearing in these circulars [13] hold out the promise of motion pictures, color slides, books, playing cards and novelties which will have the effect in the hands of the purchasers thereof of stimulating them sexually and gratifying their lascivious cravings. Quite obviously, the circulars considered as a whole are plainly designed to pander to the prurient. In this view, the circulars themselves constitute persuasive evidence that Respondent will furnish obscenity to persons induced by the descriptive technique employed therein to order the books, pictures, playing cards and other materials offered for sale. If these circular advertisements promise obscenity, as I hold they do, it is not unfair to hold the advertiser bound by his advertising. If the materials, as actually furnished,

Exhibit A—(Continued)

are in fact innocuous and non-obscene, the advertiser should have only himself to blame for going to such extreme lengths, as is done in these circulars, to persuade his addressees to the opposite impression. Thus, the effect of these circulars is to bring this enterprise, prima facie at least, within the inhibition of the postal obscenity statute. Respondent did not elect to present evidence to rebut the promise of obscenity so clearly and unmistakably spelled out in the advertising circulars. I hold that the advertising circulars constitute substantial evidence of sale or attempted sale of obscene books, motion pictures, playing cards and other items mentioned in the complaint (cf. decision of District Judge Yankwich rendered June 29, 1953, in Wallace v. Fanning, Postmaster, U.S.D.C., Southern District of California, Eastern Division, Civil Action No. 15499-T; also Farley v. Simmons, 99 F. (2d) 343, and U. S. v. Rebhuhn, 109 F. (2d) 512, cert. den. 310 U. S. 629).

As previously indicated, hearing in this case was again convened before me on March 17, 1954, at which time further evidence was received from the Solicitor with respect to Albert J. Amateau and Rarepix Co. In this connection it will be noted that in the [14] advertising circulars received in evidence at the hearing on March 10, 1954, the names, Rarepix Company and Rarepix Co., with address given as Campbell Building, Santa Monica and Fairfax, Los Angeles 46, California, appear therein as joint participants in the enterprise here under consideration. It is also to be noted that in close juxtaposition

Exhibit A—(Continued)

to the advertising message of Rarepix Co. appears an "Important Notice," which warns recipients of the circulars that correspondence relating to the obscenity offered for sale therein should be addressed, not to Rarepix Co., but to Male Merchandise Mart.

Testimony given by Inspector H. J. Simon at the hearing session on March 17, 1954, convinces me that Albert J. Amateau is, or was, the operator of Rarepix Co., contrary to Amateau's sworn disclaimer, previously mentioned. The inspector's testimony also links Amateau with the operation of other enterprises in the past involving the sale through the mails of obscenity, against which action has been taken by this Department. For record purposes, it is therefore found that Albert J. Amateau, using the fictitious name, Rarepix Co., is, or was, a participant in the sale of the obscenity items now being offered by Male Merchandise Mart.

Respondent Stanard's requests for findings of fact and conclusions of law have been considered by me and such of them as are not herein found or concluded are rejected as being immaterial or unjustified.

I find from the evidence before me that Respondent V. E. Stanard, is employing the false, fictitious and assumed names, Male Merchandise Mart and Michael Malone, for the purpose of obtaining and attempting to obtain remittances of money through the mails for an assortment of obscene, lewd, lascivi-

Exhibit A—(Continued)

ous, indecent and filthy books, motion picture films, playing cards, color slides and novelties and is depositing or causing to be deposited in the mails information showing where, how and from whom such items may be obtained, in violation of the statutes invoked, as charged in the complaint. [15] I find also that the names, Rarepix Company and Rarepix Co., are sufficiently associated with such unlawful activity to warrant the inclusion thereof in the order hereinafter recommended.

There is attached hereto the appropriate order for execution by the Deputy Postmaster General in order to suppress the unlawful enterprise herein found.

/s/ JAMES C. HAYNES,
Chief Hearing Examiner.

Duly verified.

[Endorsed]: Filed June 22, 1954. [16]

District Court of the United States in and for the Southern District of California, Central Division

No. 16866 PH

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of Los Angeles, State of California, and DOE I Through DOE X,

Defendants.

ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

Upon reading the verified Complaint of the plaintiff in the above-entitled matter, on file herein,

It Is Hereby Ordered that the defendant, Otto K. Olesen, Postmaster of the City of Los Angeles, State of California, appear before the District Court of the United States for the Central Division, in the Courtroom of the Honorable Peirson M. Hall, located in the Federal Building, Los Angeles, California, on the 28th day of June, 1954, at the hour of 10:00 o'clock a.m., of said day then and there to show cause, if any he has, why he should not, pending trial of this action, be required to turn over and deliver in the regular course of mail to plaintiff all mail matter directed to Male Merchandise Mart at 16887 West [18] Branch, Hollywood 46, Cali-

fornia, and why he should not be enjoined from refusing to deliver any and all such mail matter as may hereinafter be mailed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and why he should not be ordered to deliver to plaintiff any and all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and withheld by him prior to June 11, 1954, the date of the final administrative order, and why he should not be enjoined from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General, dated March 1, 1954, and the final administrative order of the Deputy Postmaster General, dated June 11, 1954.

It Is Further Ordered that, pending hearing on this Order to Show Cause, defendant, Otto K. Olesen, is ordered to keep in his possession, control and custody all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and he is enjoined from disposing of any such mail matter in any manner.

It Is Hereby Further Ordered that this order and the Complaint and Points and Authorities be served upon defendant, Otto K. Olesen, on or before the 24th day of June, 1954.

Dated: 22nd day of June, 1954.

/s/ PEIRSON M. HALL,

Service of copy acknowledged.

[Endorsed]: Filed June 22, 1954. [19]

[Title of District Court and Cause.]

ORDER

The Order to Show Cause in the above-entitled matter having come on regularly to be heard on the 28th day of June, 1954, at 10:00 o'clock a.m., before the Honorable Peirson M. Hall; Stanley Fleishman appearing for plaintiff, and Laughlin E. Waters, United States Attorney, and Max F. Deutz and Joseph D. Mullander, Assistants U. S. Attorney, appearing for defendants, and Joseph D. Mullander having moved for a continuance of the hearing of the said Order to Show Cause and consented in open court to the temporary restraining order continuing in effect to July 12, 1954, and good cause appearing therefor:

It Is Ordered that the defendant, Otto K. Olesen, Postmaster of the City of Los Angeles, State of California, and his agents, servants, employees and representatives appear before the District Court of the United States for the Central Division in [21] the courtroom of the Honorable Peirson M. Hall, located in the Federal Building, Los Angeles, California, on the 12th day of July, 1954, at the hour of 10:00 o'clock a.m., of said day then and there to show cause, if any they have, why they should not, pending trial of this action, be required to turn over and deliver in the regular course of mail to plaintiff all mail matter directed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and why they should not be enjoined

from refusing to deliver any and all such mail matter as may hereinafter be mailed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and why they should not be ordered to deliver to plaintiff any and all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and withheld by them prior to June 11, 1954, the date of the final administrative order, and why they should not be enjoined from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General, dated March 1, 1954, and the final administrative order of the Deputy Postmaster General, dated June 11, 1954.

It Is Further Ordered that, pending hearing on this Order to Show Cause, defendants, Otto K. Olesen, his agents, servants, employees and representatives are ordered to keep in their possession, control and custody all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and they are enjoined from disposing of any such mail matter in any manner.

It Is Hereby Ordered that on or before July 7, 1954, defendant, Otto K. Olesen, serve upon Stanley Fleishman his Return to the Order to Show Cause together with a copy of the entire administrative proceeding in the matter of the Male Merchandise Mart bearing Post Office Department Hearing Examiner's Docket No. 2/292, and his Points and Authorities, and all other papers upon which he will rely in resisting the Order to Show Cause. [22]

Dated: This 1st day of July, 1954.

/s/ PEIRSON M. HALL,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 1, 1954. [23]

EXHIBIT A
(Attached to the Reply to the Order to Show Cause.)

Post Office Department, Washington

June 24, 1954.

I certify that the annexed papers are true copies of the original documents on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

[Seal] /s/ ABE McGREGOR GOFF,
The Solicitor. [43]

Post Office Department, Washington

June 11, 1954.

Order No. 55656.

Satisfactory evidence having been presented to the Post Office Department that Male Merchandise Mart, Michael Malone, Rarepix Company, Rarepix

Co., and their agents and representatives as such, at Hollywood, California, are using the United States mails in violation of Section 259a of Title 39, United States Code, which prohibits the obtaining, or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and the depositing, or causing to be deposited, in the mails information as to where, how, or from whom the same may be obtained, said evidence being a part of the record in the case identified below by docket number, and by authority vested in the Postmaster General by said law and by him delegated to me by order of the Postmaster General No. 55507, dated January 13, 1954, you are hereby forbidden to pay any postal money order drawn to the order of said concerns and parties and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

By the same authority you are hereby further instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concerns and parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words, "Unlawful: Mail to this

address returned by order of the Postmaster General," plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words, "Unlawful: Mail to this address returned by order of the Postmaster General," plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

By direction of the Postmaster General.

/s/ CHARLES R. HOOK, JR.,
Deputy Postmaster General.

(Case No. 8668-E)

(H. E. Docket No. 2/292)

To the Postmaster,
Hollywood, Los Angeles, California. [44]

Post Office Department, Washington

June 11, 1954.

H. E. Docket 2/292

In the Matter of the Complaint That:

ALBERT J. AMATEAU and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART and MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Sections 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

DECISION OF THE DEPUTY POSTMASTER GENERAL ON APPEAL

The Hearing Examiner in this case rendered an initial decision on April 30, 1954, in which it was found that the Respondent is engaged in conducting an enterprise through the mails in violation of the statutes invoked, as alleged in the Complaint.

The Respondent has appealed from the Hearing Examiner's initial decision and has filed an appeal brief containing exceptions thereto. The Solicitor has filed a reply brief. The entire official record has been reviewed and upon the basis thereof this decision is made. [45]

Careful review of the initial decision of the Hearing Examiner discloses no erroneous findings of fact or conclusions of law insofar as is determinable from the official record. It is founded upon substantial evidence and sound reasoning and contains correct findings of fact and conclusions of law upon all material issues. Therefore, it is hereby adopted and affirmed as the decision of the Post Office Department in this case and the order recommended by the Examiner shall be issued and is hereby made a part hereof by reference.

/s/ CHARLES R. HOOK, JR.,
Deputy Postmaster
General. [46]

INITIAL DECISION OF HEARING EXAMINER

[The Initial Decision of Hearing Examiner is identical to Exhibit A attached to the Complaint and is set out in full at pages 11 to 19 of this printed record.]

Post Office Department
Office of the Solicitor
Washington 25, D. C.

BEH:omd
Sol. Doc. 5/32

June 11, 1954.

H. E. Docket No. 2/292

In the Matter of the Complaint That:

ALBERT J. AMATEAU, and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART, and MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Sections 255 and 259a, and of Title 18 U. S. Code, 1342 and 1461.

SOLICITOR'S REPLY TO RESPONDENTS' BRIEF ON APPEAL

Pursuant to Section 150.423 of the Rules of Practice and at the direction of the Hearing Examiner,

the following reply to respondents' brief on appeal is respectfully submitted:

Examination of the respondents' brief on appeal discloses that the matters therein set out, except for the Impound Order, have been fully covered in the proposed findings of fact and conclusions of law previously filed by the Assistant Solicitor. Respondents' exception to the Examiner's initial decision that the circulars constitute persuasive evidence that obscenity will be furnished to persons induced by the descriptive technique employed therein is based [59] on hearsay and unsupported by substantial evidence, is not a valid exception. Post Office Inspectors H. J. Simon and C. E. Dunbar appeared as witnesses for the Solicitor. They identified and there were received in evidence circulars soliciting remittances for the books, pictures, playing cards and other materials offered for sale. The inspectors testified that the said circulars were received through the mails addressed to various test names used by them in their official investigation. The introduction of this evidence established the basic fact, namely, that the respondent was sending circular matter through the mails soliciting remittances for certain motion pictures, color slides, books, playing cards and novelties. Once this basic fact was established, as it clearly was here, the Hearing Examiner was permitted to examine the circulars and draw a conclusion based on common sense enlightened by human knowledge and experience. The Examiner, after perusing the circulars, found that they were plainly

designed to pander to the prurient and the circulars were persuasive evidence that the respondent will furnish obscenity to persons induced by the descriptive technique employed in the said circulars. Such a conclusion, as an inspection of the circulars in evidence will clearly show, was the only one common sense enlightened by human knowledge and experience would allow and the courts have so held. On June 29, 1953, a decision on this point was rendered by District Judge Yankwich, sitting in the U. S. District Court, Southern District of California, Eastern Division, in the case of [60] Lee A. Wallace, a/k/a W. A. Lee, v. Fanning, Postmaster, Civil Action No. 15499-T. In his finding of fact the Judge states that the Postmaster General had circulars sent through the mails soliciting addressees:

> "To purchase a certain device which, as disclosed by the pictures in the said obscene and indecent literature, consisted of a completely nude woman with large breasts accentuated in the pictures."

The Court held that the Postmaster General, upon the basis of the circulars, properly concluded that "W. A. Lee" was obtaining and attempting to obtain remittances of money through the mails for an obscene article in violation of 39 U. S. Code 259a, and stated as a conclusion of law:

> "1. That the Postmaster General had substantial evidence to support his findings, which was fairly arrived at, that the plaintiff and his agents and representatives were using the

> United States mails in violation of 259a of Title 39, United States Code, for the purpose of obtaining or attempting to obtain remittances of money through the mails for an obscene, lewd, lascivious, indecent, filthy, or vile article, and the finding and order of the Postmaster General are not reviewed by this Court."

To the same effect is the case of United States v. Rebhuhn, 109 F. (2d) 512, cert. den. 310 U. S. 629, wherein the Court states that:

> "the circulars were no more than appeals to the salaciously disposed and no sensible jury could have failed to pierce the fragile screen, set up to cover that purpose."

Indisputably the Court in the above statement held the advertisements to be obscene, even though under certain conditions the books "were [61] not obscene per se." The conclusion is inescapable that the Court concluded that the advertisements represented to the purchaser that he would furnish obscene books in return for his remittance through the mails.

Clearly the evidence in the instant case required the Examiner to reach the conclusion he did reach that this enterprise falls within the provisions of the postal obscenity statutes. Respondent did not elect to present evidence to rebut the promise of obscenity so clearly and unmistakably spelled out in the advertising circulars.

As stated in 31 C. J. S. Evidence, Section 117:

> "A presumption of law is an inference which, in the absence of direct evidence on the subject,

> the law requires to be drawn from the existence of certain established facts; a presumption which the law compels, and which may be conclusive or rebuttable; a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is prima facie correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown. Where such evidence is introduced, the presumption is functus officio and drops out of sight, but the evidence must be credible." (Footnotes omitted.)

The evidence supporting the Examiner's initial decision is clearly substantial and based on the whole record. The Lee A. Wallace case, supra, a case almost identical in facts to the instant one, held that the Postmaster General had substantial evidence to support his findings.

Hannegan v. Esquire, 327 U. S. 146, cited by counsel for respondent is not in point in the instant case. The Esquire case specifically [62] held that the Postmaster General is without power to prescribe standards for literature or art which a mailable periodical (not obscene) disseminates, or to determine whether the contents of the periodical meet some undefined standard of what might be good for the public.

In the instant case the Hearing Examiner's initial decision was not in the least concerned with

what might be good or bad art or literature or what he personally might deem good for the public. The Examiner deals only with the issue of whether or not respondent is obtaining or seeking to obtain money through the mails for articles of an obscene character as described and held out by the advertisements. This fact he found clearly and unmistakably spelled out. The Esquire case, supra, at page 158, recognizes the validity of the obscenity laws in that the mails "may not be used to satisfy all tastes, no matter how perverted."

With respect to the Impound Order, the Department maintains the position that Justice Douglas has not had an opportunity to examine the facts. Therefore, the Impound Order should not be considered unlawful until a full judicial review of law and facts has been had by a court of competent jurisdiction. Moreover, both the U. S. District Court and the Court of Appeals in effect upheld the legality of the Order and it is not clear that Justice Douglas had jurisdiction to adjudicate the question presented. Justice Douglas, in effect, expresses his lack of certainty as to what authority he did have and states at page 6 of his opinion: "Since petitioner will, in due course, get judicial review of the important question of law tendered and since the action I am asked to take runs counter to the requirements of orderly procedure, I will deny the relief asked." [63]

Reference to the record as a whole in the case against respondent shows that the Initial Decision

is correct, and that it is amply supported by the evidence presented and the testimony given at the hearing. The Solicitor's proposed findings of fact and conclusions of law cite sound legal authority for the issuance of an "Unlawful" order against Male Merchandise Mart, Michael Malone, Rarepix Company and Rarepix Co., at Los Angeles, California.

Inasmuch as no new issues have been raised in respondent's appeal brief, except those dealt with above, and no sound reason has been advanced showing error in the Initial Decision of the Hearing Examiner, it is respectfully recommended that the said decision be adopted by the Deputy Postmaster General and an order forthwith issue against respondents in this case.

/s/ WILLIAM C. O'BRIEN,
Assistant Solicitor,
Post Office Department.

To the Administrative Assistant.

To the Deputy Postmaster General. [64]

SUBJECT INDEX

Table of Authorities

Post Office Department
Office of Hearing Examiners
Washington 25, D. C.

H. E. Docket No. 2/292

In the Matter of the Complaint That:

ALBERT J. AMATEAU and V. E. STANARD, Using the Fictitious, False or Assumed Names and Addresses:

MALE MERCHANDISE MART and MICHAEL MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through the Mails in Violation of 39 U. S. Code, Sections 255 and 259a, and of Title 18, U. S. Code, 1342 and 1461.

APPEAL FROM INITIAL DECISION

I.

Statement of the Case

The Solicitor of the Post Office Department filed a Complaint against V. E. Stanard and another, d/b/a Male Merchandise Mart, and other names alleging that the said Stanard was engaged in the unlawful enterprise of attempting to obtain remit-

tances of money through the mail for certain articles of obscene, etc., nature. [67] The case of Stanard was severed from the others and the case against her proceeded without reference to the others. It was established that Stanard is an actual individual who owns the Male Merchandise Mart and that she filed a proper certificate with the County Clerk of Los Angeles County.

At the same time that the Solicitor filed his Complaint the Deputy Post Master General issued an impound order which order was and is final and which order was not the subject of the hearing on the Solicitor's Complaint held in Washington, D. C., March, 1954.

The chief Hearing Examiner found that there was evidence that Stanard was obtaining and attempting to obtain money through the mails for obscene matter although the matter that Stanard was sending through the mail was not introduced in evidence. The Hearing Examiner held that "the circulars themselves constituted persuasive evidence," that the matter Stanard did mail would be obscene.

II.

Exception to Specific Findings and Conclusions of Fact or Law and Exception to the failure of the Initial Decision to Include Other Findings or Conclusions of Fact or Law:

(a) Stanard excepts to the failure of the Hearing Examiner to include or discuss her findings of

fact II, III, IV, VI, VII, and her conclusion of law I.

(b) Stanard excepts to the finding and conclusion of the Hearing Examiner that she is engaged in a business of sending obscene matter through the mail.

III.

Argument

The impound order issued by the Deputy Postmaster [68] General is invalid and should be voided:

Although the impound order was not the subject of the Administrative hearing, the Postmaster has the power, authority and duty to revoke it if it is an invalid order. It is an invalid order; see Stanard vs. Olesen, May 22, 1954, by Mr. Justice Douglas in chambers.

(b) The finding of fact and conclusion of law that Stanard is engaged in the business of mailing obscene matter is:

1. Arbitrary, capricious, an abuse of discretion and not in accordance with law;

2. Contrary to constitutional right and power;

3. In excess of statutory jurisdiction, authority or limitations and short of statutory right;

4. Unsupported by substantial evidence and unwarranted by the facts.

There is a distinction between Obscenity and naughtiness, Hannegan vs. Esquire, 327 U. S. 146, which has not been here recognized.

The requirement of the Administrative Procedural Act that a final order must be based upon substantial evidence means that the order must be based upon more than hearsay evidence; see Universal Camera Corp. vs. National Relations Board, 340 U. S. 477. The finding here that Stanard is mailing obscene matter through the mail is based wholly on hearsay evidence and as such is unsupported by substantial evidence and therefore void.

Conclusion: The initial decision of the Hearing Examiner is unsupported by substantial evidence and void as a matter of law. The Postmaster General should issue an order dismissing the Complaint. The Postmaster General should also issue an order voiding the impound order whether or not he dismisses the Complaint [69] since the impound order is invalid.

. . . . . ,
STANLEY FLEISHMAN. [70]

Post Office Department, Washington

I certify that the annexed . . . . . true . . . . . of the original . . . . . in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

. . . . . ,
Postmaster General of the United States of America. [71]

EXHIBIT B

(Attached to the Reply to Order to Show Cause)

United States District Court, Southern District of California, Central Division

Civil Action No. 16866-PH

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California, et al.,

Defendant.

Mr. William C. O'Brien, being duly sworn, says:

(1) That he is Assistant Solicitor for the Post Office Department and has been employed as an attorney in the Office of the Solicitor at all times mentioned hereafter;

(2) That he is personally familiar with the matters stated herein except as to those relating to criminal proceeding against David S. Alberts which are matter of official record;

(3) That he has personally participated in all or practically all of the formal proceedings instituted by the Post Office Department against David S. Alberts and his wife, Violet Evelyn Alberts, nee

Stanard, doing business under various names as hereinafter set forth;

(4) That several fraud orders have been issued against various enterprises conducted through the mails by David S. Alberts in which money was solicited and obtained by means of false and fraudulent pretenses, representations and promises made by both in order to obtain the sale of numerous books, photographs relating to sexual matter and a preparation for delaying ejaculation, said enterprises having been determined by the Postmaster General to constitute violations of Title 39, U. S. Code, Sections 259 and 732. The name of such enterprises and the dates on which the orders were issued are as follows:

The Camera King,
"Camera" King,
Camera King, and
Camera, at Hollywood, California. [73]

Charge: Fraud—Sale of alleged obscene photographic prints.

Fraud Order issued July 7, 1948.

* * *

David S. Alberts,
D. S. Alberts, and
Intimate Publications, at
Hollywood, Los Angeles, California.

Charge: Fraud—Sale of alleged obscene books and photographs and a preparation for delaying ejaculation.

Fraud Order issued March 29, 1950.

(5) Numerous other enterprizes which were conducted through the mails by David S. Alberts and Violet Evelyn Alberts, nee Stanard, have been the subject of orders stopping the delivery of mail which were issued by the Postmaster General pursuant to the provisions of Title 39, U. S. Code 255 and 18 U. S. Code 1342 and 1461, upon substantial evidence showing that David S. Alberts or Violet Evelyn Alberts, nee Stanard, were conducting through the mails unlawful businesses under fictitious names. The names of said enterprises and the dates on which the orders were issued are as follows:

V. E. Stanard, under the false, assumed and fictitious name and address:

House of McCoy at
Box 7942, Del Valle Station,
Los Angeles, California.

Charge: Sale of obscene photographs.

Fictitious Order issued June 10, 1948.

* * *

David S. Alberts, under the false, assumed and fictitious name and address:

Hollywood Extras, at
Box 848 Preuss Station,
Los Angeles 5, California, and
1605 N. LaBrea,
Hollywood 28, Los Angeles, California.

Charge: Sale of obscene photographs.

Fictitious Order issued June 30, 1948. [74]

* * *

David S. Alberts, under the false, assumed and fictitious names and address:

Novelty Shop, and
Box 167, at
Hollywood 28, Los Angeles, California, and
Stephen Allen, at
Box 167,
Hollywood 28, Los Angeles, California.

Charge: Sale of obscene cartoon books and photos.

Fictitious Order issued October 14, 1948.

* * *

David Stephen Alberts, under the false, assumed and fictitious names and address:

Rex Sales Company, and
Rex Sales Co., at
P.O. Box 9817,
Hollywood, Los Angeles, California.

Charge: Sale of obscene photographs in evasion of fictitious orders issued June 30, 1948, against Hollywood Extras, and on October 14, 1948, against Novelty Shop, et al., both at Los Angeles, California.

Supplemental Fictitious Order issued December 13, 1948.

* * *

David Stephen Alberts, under the false, assumed and fictitious name and address:

V. E. Alberts, at
5402A W. Pico Avenue,
Los Angeles 35, California.

Charge: Sale of obscene photographs—Evasion of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Supplemental Fictitious Order No. 39703 issued January 27, 1949.

Note: March 3, 1949—Postmaster General issued order modifying fictitious order of January 27, 1949, to apply to mail addressed to V. E. Alberts, at 5402A W. Pico Avenue, Los Angeles 35, California.

Fictitious order of January 27, 1949, revoked in its entirety June 8, 1949. [75]

* * *

David Stephen Alberts, under the false, assumed and fictitious name and address:

Q. T. Studios, at
55 E. Washington St.,
Chicago 2, Illinois.

Charge: Sale of obscene motion picture films in evasion of fictitious order issued June 30, 1948, against Hollywood Extras at Los Angeles, California.

Supplemental Fictitious Order issued February 15, 1949.

* * *

David Stephen Alberts, under the false, assumed and fictitious name and address:

Jack Riley, at
Box 2087,
Hollywood 28, California.

Charge: Sale of obscene photographs. Evasion of

fictitious order issued June 30, 1948, against Hollywood Extras at Los Angeles, California.

Supplemental Fictitious Order issued February 17, 1949.

* * *

David S. Alberts, under the false, assumed and fictitious name and address:

Gem Studios, at
P.O. Box 9817, Los Feliz Station,
Los Angeles 27, California.

Charge: Sale of obscene booklets—Extension of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Supplemental Fictitious Order issued March 28, 1949.

* * *

David S. Alberts, under the false, assumed and fictitious names and address:

Triangle,
Triangle Studios,
Triangle Co., and
P.O. Box 2388, at
Hollywood, Los Angeles, California.

Charge: Sale of obscene photographic slides—Evasion of fictitious order of June 30, 1948, against Hollywood Extras at Los Angeles, California.

Supplemental Fictitious Order issued September 16, 1949. [76]

* * *

David S. Alberts, under the false, assumed and fictitious name and address:

Variety Publishing Co., at
Hollywood, Los Angeles, California.

Charge: Fictitious sale of obscene material in evasion of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Supplemental Fictitious Order issued October 31, 1949.

* * *

David Stephen Alberts, using, assuming and requesting to be addressed by a name other than his own true and proper name, to wit:

I. Lindquist, at
Los Angeles, California.

Charge: Sale of obscene photographs—Evasion of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Fictitious Order issued November 29, 1949.

(7) Upon information and belief based upon the records of the Post Office Department, David S. Alberts has been criminally prosecuted for his activities as a dealer in obscene matter. Said prosecutions are as follows:

December, 1950—Fined $200 in Los Angeles Federal Court.

June, 1950—Fined $500 and sentenced to 180 days in jail on condition that he serve 60 days, and placed on probation for three years in Los Angeles Municipal Court.

(8) The Post Office Department is daily receiv-

ing complaints from persons living in various parts of the United States who object to receipt of the advertisements sent to them through the mails by plaintiff Violet Evelyn Stanard using the false, fictitious and assumed names Male Merchandise Mart and Michael Malone. Said complaints denounce plaintiff's advertisements (copies whereof are hereto attached) [77] as obscene, lewd, lascivious, indecent and contrary to the standards of the community. Such complaints are typical of thousands of similar complaints which have been directed to the Post Office Department, to members of Congress, to the President of the United States and others in official life, with respect to numerous enterprises hereinbefore named which plaintiff and her husband have conducted through the mails under constantly changed fictitious names which complaints affiant in his capacity as an employee of the Department has had occasion to read.

(9) That the use of such fictitious names of plaintiff and her husband, David S. Alberts, is a device whereby they may defeat the enforcement of the United States statutes prohibiting the use of the mails to conduct unlawful enterprises in violation of the postal fraud and obscenity statutes.

/s/ WILLIAM C. O'BRIEN.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of June, 1954.

[Seal] /s/ CHARLOTTE B. STILLWELL,
Notary Public.

My Commission expires 1-31-58. [78]

EXHIBIT C

(Attached to the Reply to Order to Show Cause)

United States District Court for the Southern District of California, Central Division

No. 16866-PH

V. E. Stanard, Individually and d/b/a MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of Los Angeles, State of California, and DOE I Through DOE X,

Defendants.

AFFIDAVIT OF RALPH E. STAPENHORST

United States of America,
Southern District of California—ss.

Ralph E. Stapenhorst, being first duly sworn, deposes and says:

That I am a Post Office Department Inspector for the Post Office Department in Los Angeles, California, and have been so employed at all times hereinafter mentioned.

That I am personally familiar with the matters stated herein.

That I have personally participated in all or practically all of the investigations conducted by the Post Office Department in regard to David S.

Alberts and his wife, Violet Evelyn Alberts, nee Stanard, doing business under various fictitious firm names, including the fictitious firm name of Male Merchandise Mart.

That I believe that V. E. Stanard is the wife of David Stephen Alberts. This information was obtained by examining the records of the Los Angeles County Clerk, which records revealed that marriage license No. 20982 was obtained by David Stephen Alberts and Violet Evelyn Stanard in October of 1947, and that marriage certificate No. 32345 for David Stephen Alberts and Violet Evelyn Stanard, dated October 25, 1947, is contained in book 2897, page 6, of the marriage record of the Los Angeles County Clerk. Said marriage certificate discloses that David Stephen Alberts is self-employed in the mail-order business.

That I personally investigated the case of V. E. Alberts, also known as Violet Reams, doing business as Rex Sales Company, vs. Fanning, Postmaster, No. 8986-Y. In the course of that investigation the following occurred. On July 1, 1948, a person applied for and rented Post Office Box 9817 as Los Feliz Station of the Los Angeles Post Office Department. On the application that person listed the name of the applicant as Rex Sales Company, and signed her name as Violet Reams, giving her address as 6840 Fountain Avenue, Hollywood 28, California. I thereafter went to 6840 Fountain Avenue, Hollywood 28, California. I found that there was no such number on Fountain Avenue.

Thereafter, I wrote to Violet Reams at Post Office Box 9817, Los Feliz Station of the Los Angeles Post Office Department, wherein I requested that she come to my office for an interview on October 15, 1948. On that date there came to my office a woman who represented herself to be Violet Reams. She was accompanied by her attorney, a Mr. William Strong. Mr. Strong assured me that the woman with him was Violet Reams, and I therefore did not require identification. I was thereafter present in the courtroom of Judge Yankwich on December 24, 1948, at which time the case of V. E. Alberts, also known as Violet Reams, doing business as Rex [85] Sales Company, vs. Fanning, Postmaster, No. 8986-Y, was being heard. At that time I observed a woman who accompanied the attorney for the plaintiff. She was the same woman who had previously represented to me that she was Violet Reams. I was also present in the courtroom of Judge Hall on Monday morning of June 28, 1954. At that time I observed the woman who accompanied Mr. Fleishman, attorney for the plaintiff in this action. She was the same woman who had previously represented to me that she was Violet Reams and who had accompanied the attorney for the plaintiff in the case of Alberts vs. Fanning, on December 24, 1948.

That I personally investigated the case of United States of America vs. D. S. Alberts, No. 21512-PH. I was present in the courtroom of Judge Hall when D. S. Alberts pleaded guilty to violation of 18

U. S. C. A. 1461, for mailing obscene matter, and was sentenced to pay a fine of $200.00.

That I am personally familiar with the Los Angeles Municipal Court Criminal Case, No. 02189, involving D. S. Alberts, under the following circumstances. On November 14, 1949, I was notified by the Los Angeles Police Department that D. S. Alberts had been arrested that day on a warrant charging violation of Los Angeles Municipal Code and the California Penal Code, with regard to selling or keeping for sale obscene and indecent writings, prints, pictures and other matter. At about 7 p.m., on said date I went to the Hollywood Police Station and there observed 41 boxes of alleged obscene and indecent writings, prints, pictures and other matter, which had been taken by the police as evidence. I was informed by the police officers that this evidence had been obtained from the premises of D. S. Alberts. I had been notified by the police officers of the arrest, because the material taken indicated that it was obviously being disseminated by mail. Upon inspecting the material, I observed many envelopes, stamps and mailing [86] lists. There were approximately 18 metal file trays which contained mailing lists. Later I inquired of the City Attorney of Los Angeles, as to the disposition of the case. I was informed that in the Municipal Court of Los Angeles, Alberts had been found guilty of violating Section 311(3) of the California Penal Code, and on June 16, 1950, was sentenced to 180 days in jail, suspended on condition

that he serve 60 days, pay a $500.00 fine, and remain on probation for three years. Later, upon inspection of the records of the Clerk of the Municipal Court of the City of Los Angeles, I learned that probation was suspended in February of 1951.

That I have personally inspected the mail addressed to Male Merchandise Mart, which is presently being impounded by the Post Office Department in Los Angeles. The mail received before June 11, 1954, is being kept separate and intact from the mail received after June 11, 1954. The bulk of the total mail has been received before June 11, 1954. I would estimate that the mail received before June 11, 1954, constitutes approximately 98% of the total mail. It further appears from the amount of mail received after June 11, 1954, that the amount to be received in the future, if any, will be relatively insignificant when compared to the amount of mail received before June 11, 1954.

/s/ RALPH E. STAPENHORST,
Affiant.

Subscribed and sworn to before me this 1st day of July, 1954.

[Seal] EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

By /s/ CHARLES E. JONES,
Deputy.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 7, 1954. [87]

[Title of District Court and Cause.]

AFFIDAVIT OF STANLEY FLEISHMAN

State of California,
County of Los Angeles—ss.

Stanley Fleishman, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above-entitled matter.

That he received a copy of the Order of the Court of Appeals for the Ninth Circuit, attached hereto and marked Exhibit "A" and by this reference incorporated herein. That subsequently and on July 27, 1954, he mailed to the Court of Appeals his Consent to Dismissal, attached hereto as Exhibit "B" and by this reference incorporated herein.

/s/ STANLEY FLEISHMAN.

Subscribed and sworn to before me this 27th day of July, 1954.

[Seal] /s/ IRMA HIRSCHSON,
Notary Public in and for Said
County and State. [89]

EXHIBIT "A"

At a Stated Term, to wit: The October Term, 1953, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Franciso, in the State of California, on Friday the sixteenth day of July in the year of our Lord one thousand nine hundred and fifty-four.

Present: Honorable William Healy, Circuit Judge, Presiding,
Honorable Homer T. Bone, Circuit Judge,
Honorable William E. Orr, Circuit Judge,

No. 14361

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually, and as Postmaster of the City of Los Angeles, State of California,

Appellee.

ORDER THAT APPELLANT SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED

Good cause therefor appearing, it is Ordered that the appellant file with the clerk of this court on or before July 27, 1954, proper showing why the appeal in this cause should not be dismissed as [90] moot.

EXHIBIT "B"

United States Court of Appeals, Ninth Circuit

No. 14361

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually, and as Postmaster of the City of Los Angeles, State of California,

Appellee.

CONSENT TO DISMISSAL OF APPEALS AS MOOT

Plaintiff, through her attorney, consents to the dismissal of the Appeal as moot.

Dated: July 27, 1954.

.....,
STANLEY FLEISHMAN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 28, 1954. [91]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The Order of The Postmaster General of March 1st, 1954, was made without notice or hearing of any kind whatsoever. It directed the defendant Postmaster to refuse to deliver plaintiff's mail to her and to impound it. It was made under the purported authority of 39 U. S. C. 259(a). No statutory authority exists for it or any such order. It is void. It should be noted that while the Government contends in this proceeding that such statutory authority presently exists, the Post Office Department is at the same time contending that it does not in seeking the passage of legislation calculated to permit it. See H. R. 569, 83rd Cong.

The Order of June 11th, 1954, made after notice and a hearing (of sorts) is void. No evidence of any kind was [93] offered or received before the Post Office Department to support the conclusion that the matter for which the use of the mail was forbidden by the order, is within the prohibition of the statute; none of such matter was offered or received. The circulars advertising the material were the only things received, and they are specifically found not to be within the prohibited terms of obscenity, etc., of the statute. For the solicitor of the Post Office Department and the Postmaster General to find that something is obscene, lewd, lascivious, indecent, filthy or vile, without even seeing it or a copy or a fac similie of it, contemplates that Con-

gress intended that the right to use the mails should be subject to some government administrators power of divination or clairvoyance. Such powers are not recognized in any Act of Congress I have ever seen. Chief Justice Hughes in U. S. vs. Macintosh, 283 U. S. 605 spoke of departmental zeal outrunning statutory authority. I have seen many examples of it, but none so arbitrary as the instant order.

It is not necessary to reach to the constitutional questions as both the orders are void as being in excess of the statutory powers of the Postmaster General.

Plaintiff's counsel will prepare Findings, Conclusions and Judgment for Injunctions pendente lite.

/s/ PEIRSON M. HALL,
United States District Judge.

Dated: August 4th, 1954.

[Endorsed]: Filed August 4, 1954. [94]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter having come on for hearing upon the Order to Show Cause on June 28, 1954, and on July 12, 1954, before the Hon. Peirson M. Hall, Judge presiding; Stanley Fleishman appearing for the plaintiff, and Laughlin E. Waters, United

States Attorney, and Max F. Deutz and Joseph D. Mullender, Assistants United States Attorney, appearing for defendants, and the Court having examined the file and heard oral argument and having taken the cause under submission and having filed its memorandum opinion, now makes its Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That at all times since March 1, 1954, Otto K. Olesen was and he now is the duly appointed, qualified and acting [95] Postmaster of the City of Los Angeles, State of California, charged with the duty of administering and managing the United States Post Office in and for said City, and in charge of and responsible for the receipt and distribution of material sent through the United States Mails for delivery in and from said City.

II.

That plaintiff, V. E. Stanard is and has been engaged in the business of distributing and selling through the mail certain publications, pin-up pictures and novelties under the firm name and style of Male Merchandise Mart.

III.

That on March 1, 1954, the Solicitor of the Post Office Department issued a complaint against plaintiff charging that she was carrying on by means of the Post Office, under the firm name and style of

Male Merchandise Mart, a scheme for obtaining money for articles of an obscene character.

IV.

That on March 1, 1954, without notice or hearing, and before there had been any determination of illegal activity on the part of plaintiff, defendant Otto K. Olesen, under orders of the Deputy Postmaster General, impounded and refused to deliver to plaintiff any mail addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California.

V.

Plaintiff answered the Solicitor's complaint and denied the charge. On March 10, 1954, a hearing was held in Washington, D. C. None of the books, motion picture films, playing cards, color slides or other items described in the complaint as being obscene, were offered or received in evidence. Circulars mailed by the plaintiff were offered in evidence in the said administrative hearing. [96]

VI.

On April 30, 1954, the Hearing Examiner filed his initial decision and found that plaintiff was selling or attempting to sell obscene books, motion pictures, playing cards and other items described in the complaint. On June 11, 1954, the Deputy Postmaster General issued a decision affirming and adopting the initial decision of the Hearing Examiner and on the same day the Deputy Postmaster General issued an order addressed to defendant Otto K. Olesen directing him to return to the senders all mail mat-

ter addressed to the plaintiff with the word "unlawful" written or stamped on the outside thereof.

VII.

That from March 1, 1954, to June 11, 1954, defendant Otto K. Olesen refused to deliver to plaintiff her mail addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, pursuant to the impound order of March 1, 1954.

VIII.

That from June 11, 1954, to date, defendants have refused to deliver to plaintiff her mail addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, pursuant to the final Administrative order of June 11, 1954.

IX.

That plaintiff has exhausted all of her administrative remedies.

X.

That there was no evidence in the administrative hearing that any of the material sold or offered for sale by plaintiff, or any of the circulars distributed by the plaintiff was obscene, lewd, lascivious, indecent, filthy or vile.

XI.

That no Findings or Conclusions are made with respect to the constitutionality of the statutes under which the orders [97] were made.

Conclusions of Law

I.

That the impound order of the Deputy Postmaster General dated March 1, 1954, is a final order.

II.

That the order of the Deputy Postmaster General dated June 11, 1954, is a final order.

III.

That the plaintiff has exhausted all of her administrative remedies and is entitled to injunctive relief for the reason that she has no other adequate remedy available.

IV.

That the impound order dated March 1, 1954, is invalid and void for the reason that there is no authority in law for the issuance of such an order without notice or hearing.

V.

That the order of June 11, 1954, is invalid and void for the reason that it is unsupported by substantial or any evidence and is arbitrary, capricious and an abuse of discretion and not in accordance with law.

VI.

That plaintiff is entitled to a preliminary injunction directed to the defendant, Otto K. Olesen, his agents, servants and employees, ordering them and each of them to forthwith deliver up to plaintiff all mail matter of any kind or nature in their posses-

sion, or custody or under their control, addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and enjoining the defendants and each of them from in any manner failing or refusing to deliver in the regular course of mail any and all mail matter addressed to Male Merchandise [98] Mart, at 16887 West Branch, Hollywood 46, California, and from in any manner carrying out or enforcing the Deputy Postmaster General's order dated March 1, 1954, or the Deputy Postmaster General's order dated June 11, 1954.

Aug. 13, 1954.

/s/ PEIRSON M. HALL,
Judge.

Approved as to Form.

....,
Attorneys for Defendants.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

Lodged August 5, 1954.

[Endorsed]: Filed August 13, 1954. [99]

District Court of the United States in and for the Southern District of California, Central Division

No. 16866-PH

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of Los Angeles, State of California, and DOE I Through DOE X,

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

To Otto K. Olesen, Postmaster of the City of Los Angeles, State of California, and his agents, servants and employees:

The above matter having come on for hearing upon the Order to Show Cause on June 28, 1954, and on July 12, 1954, before the Hon. Peirson M. Hall, Judge presiding; Stanley Fleishman appearing for the plaintiff, and Laughlin E. Waters, United States Attorney, and Max F. Deutz and Joseph D. Mullender, Assistants United States Attorney, appearing for defendants, and the Court having examined the file and heard oral argument and having taken the cause under submission and having filed its memorandum opinion and its Findings of Fact and Conclusions of Law, and good cause appearing therefor:

It Is Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order [101] the defendant, Otto K. Olesen, and his agents, servants and employees are ordered to turn over and deliver to plaintiff, V. E. Stanard, all mail matter directed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, which is in their possession or custody or under their control.

It Is Further Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order, the defendant, Otto K. Olesen, and his agents, servants and employees are hereby enjoined and restrained from failing or refusing to deliver to plaintiff in the regular course of mail, any and all properly addressed prepaid letters, cards and packets, addressed to Male Merchandise Mart, at 16887 West Branch, Hollywood 46, California.

It Is Further Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order, the defendant, Otto K. Olesen, and his agents, servants and employees are hereby enjoined from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General dated March 1, 1954, impounding plaintiff's mail.

It Is Further Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order, the defendant, Otto K. Olesen, and his agents, servants and employees are

hereby enjoined from enforcing in any respect whatsoever the Deputy Postmaster General's final order No. 55656 dated June 11, 1954.

Dated: August 13, 1954.

/s/ PEIRSON M. HALL,
Judge.

Approved as to Form:

....,
Attorneys for Defendants.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

Lodged August 5, 1954.

[Endorsed]: Filed and entered August 13, [102] 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Otto K. Olesen, individually and as Postmaster of the City of Los Angeles, State of California, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Preliminary Injunction made and entered in this matter by the United States District Court,

Honorable Peirson M. Hall, Judge presiding, on August 13, 1954.

Dated: August 16, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney;

/s/ JOSEPH D. MULLENDER, JR.,
Attorneys for Defendant,
Otto K. Olesen.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 16, 1954. [104]

In the United States Court of Appeals
for the Ninth Circuit

C.C.A. No. 14546

OTTO K. OLESEN, as Postmaster of the City of Los Angeles, State of California, et al.,

Appellants,

vs.

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Appellee.

ORDER TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL

Good cause appearing therefor, It Is Hereby Ordered, Adjudged and Decreed that the Order Granting a Preliminary Injunction, made and entered in the District Court of the United States for the Southern District of California on August 13, 1954, in action No. 16866-PH, entitled V. E. Stanard, et al., vs. Otto K. Olesen, et al., be and the same is hereby stayed pending appeal from said Order Granting a Preliminary Injunction, or until further order of this Court, as follows:

So much of said Order as provides that during the pendency of the District Court action the defendant, Otto K. Olesen, and his agents, servants and employees are ordered to turn over and deliver to plaintiff, V. E. Stanard, all mail matter directed

to Male Merchandise Mart which was in their possession or custody or under their control on August 13, 1954, is hereby stayed;

So much thereof as enjoined the defendant, Otto K. Olesen, and his agents, servants and employees from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General dated March 1, 1954, impounding plaintiff's mail is hereby stayed;

So much thereof as ordered that during the pendency of the District Court action the defendant, Otto K. Olesen, and his agents, servants and employees were enjoined from enforcing in any respect whatsoever the Deputy Postmaster General's final order No. 55656 dated June 11, 1954, insofar as it purported to enjoin the impounding of mail received prior to August 13, 1954, is hereby stayed.

Dated: August 16th, 1954.

/s/ ALBERT LEE STEPHENS,
U. S. Circuit Judge.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 110, inclusive, contain the orig-

inal Complaint; Order to Show Cause; Order; Reply to Order to Show Cause; Affidavit of Stanley Fleishman; Order for Judgment; Findings of Fact and Conclusions of Law; Order Granting Preliminary Injunction; Notice of Appeal; Designation of Record on Appeal and Stipulation and Order Extending Time to Docket Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of October, A.D. 1954.

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14546. United States Court of Appeals for the Ninth Circuit. Otto K. Olesen, Individually and as Postmaster of the City of Los Angeles, State of California, Appellant, vs. V. E. Stanard, Individually and d/b/a Male Merchandise Mart, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth District

C.C.A. No. 14546

OTTO K. OLESEN, as Postmaster of the City of Los Angeles, State of California, et al.,

Appellants,

vs.

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant intends to rely on the following points on Appeal of the above-entitled cause:

The District Court of the United States for the Southern District of California, Central Division, erred in granting a preliminary injunction for the appellee, and against the appellant herein, for the following reasons:

(a) The impound order of the Postmaster General, dated March 1, 1954, is not a final order.

(b) The Postmaster General has authority to impound mail prior to hearing.

(c) The final order of the Postmaster General, dated June 11, 1954, is a valid order because supported by substantial evidence.

(d) The statute (39 U.S.C.A. 259(A)), which authorized the Postmaster General to make the impound order of March 1, 1954, and the final order of June 11, 1954, is constitutional.

Dated: October 14, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney, Attorneys for Appellant,
Otto K. Olesen.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 15, 1954.

No. 14546

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California,

Appellant,

vs.

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellee.

APPELLANT'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney,
Chief, Civil Division,

JOSEPH D. MULLENDER, JR.,
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600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 14546

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California,

Appellant,

vs.

V. E. STANARD, individually and doing business under the firm name and style of MALE MERCHANDISE MART,

Appellee.

APPELLANT'S OPENING BRIEF.

Introduction.

This appeal relates generally to the postal obscenity law and to the extent of the power of the Postmaster General to restrict mail addressed to persons who have violated this law. The two specific questions to be decided are as follows:

1. Whether or not the Postmaster General has the authority to impound, or hold in *status quo*, mail addressed to a person who he believes is violating the postal obscenity law, until such time as an administrative hearing can be had and an administrative order made.

2. Whether or not the Appellee's advertising circular constitute substantial, or any, evidence of the fact that the matter advertised therein is obscene.

Statement of Jurisdiction.

The District Court had jurisdiction by virtue of 5 U. S. C. A. 1009(c) and 28 U. S. C. A. 1339. The jurisdiction of this Court is based on 28 U. S. C. A. 1292(1).

Statement of the Case.

The Appellee, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications and novelties under the firm name of Male Merchandise Mart. The general procedure followed by the Appellee is to send out illustrated advertising circulars to prospective purchasers, inviting orders for the materials advertised in the circulars.

The Post Office Department, through its inspectors, uses "test" names, which eventually become included on mailing lists which are used by mail order operators such as the Appellee. It is in this fashion that the Postmaster General obtains these adverising circulars, though many are sent to him by interested members of the public who have also received them.

After receiving some of the Appellee's advertising circulars, the following developments have taken place in this case:

March 1, 1954— The Postmaster General examined the Appellee's advertising circulars and determined that they constituted evidence satisfactory to him that the Appellee was depositing or was causing to be deposited in the United States mails information as to where, how and from whom obscene, lewd, lascivious, indecent, filthy and vile articles, matter,

things, devices, and substances may be obtained. As a result, the Postmaster General made an order instructing the Postmaster at Los Angeles to impound all mail addressed to the Appellee pending a hearing and final administrative decision. On the same date the Appellee was given notice that a hearing would be held on March 17, 1954.

March 10, 1954— The Appellee filed a Complaint in the District Court (Stanard v. Olesen, 16522-HW) wherein the Appellee prayed for an Injunction and declaration of invalidity of the Impound Order.

An Order to Show Cause was issued on that date to be heard March 25, 1954.

April 1, 1954— The District Court filed a Memorandum wherein it was indicated that the Impound Order was valid, but that it could not be reviewed in the District Court at that time, because administrative remedies would not be exhausted until there had been a final determination by the Post Office Department, and that the District Court therefore did not have jurisdiction.

April 12, 1954— Appellee filed a Notice of Appeal from the District Court's Memorandum and made a motion in this Court for relief from the Impound Order.

April 13, 1954— Judgment of Dismissal was entered in the District Court.

April 30, 1954— The initial decision of the Post Office Hearing Examiner was entered and appealed from in the administrative proceedings by Appellee.

May 7, 1954— This Court decided to hold Appellee's motion in abeyance for ninety days from March 17, 1954 (the date of the administrative hearing) to give the Post Office Department to and including June 15, 1954, within which to make and enter a final and judicially reviewable order or determination. Thereafter Appellee applied to Justice Douglas as Circuit Justice for relief from the Impound Order.

May 22, 1954— Justice Douglas denied relief on the ground that Appellee should seek judicial review according to the orderly procedure which she was already following.

June 11, 1954— The Post Office Department made and entered a final and judicially reviewable order instructing the Postmaster at Los Angeles to return all of Appellee's mail to the senders thereof.

June 22, 1954— Appellee filed a Complaint in the District Court (Stanard v. Olesen, No. 16866-PH) wherein Appellee prayed for an Injunction and declaration of

invalidity of both the Impound Order of March 1, 1954, and the Final Order of June 11, 1954. [T. R. 3-10.] An Order to Show Cause was issued to be heard June 28, 1954. [T. R. 20-21.]

June 28, 1954— The Order to Show Cause was continued to July 12, 1954. [T. R. 22-24.]

July 12, 1954— The Order to Show Cause was heard by the District Court.

July 16, 1954— This Court made an Order requiring the Appellee to show cause why the appeal taken by her on April 12, 1954 should not be dismissed because moot.

July 27, 1954— The Appellee filed in this court a consent to the dismissal of her appeal as moot. [T. R. 54.]

August 4, 1954— The District Court made an Order for Judgment for Appellee. [T. R. 57-58.]

August 13, 1954— The District Court made the Findings, Conclusions and Judgment for Preliminary Injunction which are the subject of this appeal. [T. R. 58-66.]

Statutes Involved.

The pertinent statute is: 39 U. S. C. A. 259(a), which provides as follows:

"Exclusion from Mails of Obscene, Lewd, etc., Articles, Matters, Devices, Things or Substances:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company,

partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for an obscene, lewd, lascivious, indecedent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) Instruct Postmasters at any post office at which registered letters or any other latters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the Postmaster at the office at which it was originally mailed, with the word 'unlawful' plainly witten or stamped upon the outside thereof, and all such mail matter so returned to such Postmasters shall be by them returned to the senders thereof, under such regulations as the postmaster General may prescribe; and . . ."

Summary of Argument.

The District Court Judgment for Preliminary Injunction should be reversed for the following reasons:

1. The Postmaster General had and has authority to issue the Impound Order.
2. The Final Order of the Postmaster General is supported by substantial evidence.

ARGUMENT.

I.

The Postmaster General Had and Has Authority to Issue the Impound Order.

The Postmaster General has authority, by virtue of 39 U. S. C. A. 259(a) to withhold delivery of mail to a person whenever it appears from evidence satisfactory to him that the mails are being used by that person in connection with obscene matter, either by sending obscene matter itself through the mail or by sending information as to where, how or from whom the same may be obtained.

That the Postmaster General may withhold mail prior to the holding of a hearing, prior to the conclusion thereof, and prior to the issuance of a final type order directing the return of the mail to the senders thereof, is not set forth in the statute in so many words, but the Courts have seen fit to imply this power in order to give effect to the statute.

The question has never been decided by an Appellate Court, but there are several District Court decisions holding that the Postmaster General may order the impounding of mail prior to hearing.

In *Peoples United States Bank v. Gilson* (E. D. Mo., 1905), 140 Fed. 1, the Postmaster General had issued a fraud order stopping the plaintiff's mail on the basis of reports of Postal Inspectors. The plaintiff sought an injunction on the ground that the evidence was deficient. The Court denied the injunction, pointing out that the

reports of the inspectors are entitled to great weight, and said at page 7:

> "The reports are, of necessity, evidence on which he will act. They make the reports, and their reports, in the language of the statute, was evidence satisfactory to him, the Postmaster General, that the bank was engaged in a scheme to defraud. Then, and thereupon, the Postmaster General could have issued the 'fraud order.'"

Wallace v. Fanning (S. D. Cal., 1953), unreported, No. 15499-T, is squarely in point. There, the plaintiff sought to enjoin the Postmaster at Los Angeles from impounding mail prior to hearing. Judge Yankwich, who heard the case during Judge Tolin's illness, denied the injunction and stated in his conclusions of law:

> "That under the powers given by Sections 255 and 259(a), Title 39, U. S. C., the Postmaster General had a reasonable time while instituting administrative proceedings and holding a hearing on the evidence, to impound the mail addressed to W. A. Lee at the address mentioned."

See also Appendix to this Brief for unreported District Court Opinions in *Pink Williams, also known as "Cowboy" Pink Williams v. Petty* (E. D. Okla., 1954), and *Barel v. Fiske* (S. D. N. Y., 1954).

But aside from these cases, there are cogent reasons for imposing upon the Postmaster General the duty as well as the power to impound mail prior to hearing in order to protect the public interest in keeping obscene matter out of the mails.

Congress, in granting to the Postmaster General the power to impound mail prior to administrative hearing under 39 U. S. C. A. 259(a), and the Courts, in upholding this power, have undoubtedly had in mind the obvious necessity of doing so, because of the possibility that so-called "fly-by-night" mail order operators might evade the law effectively if they could receive their mail pending an administrative hearing and final determination thereof. Certainly, Congress and the Courts must have visualized the situation whereby a person assumes a fictitious name, sends out circulars inviting mail orders at a given address, and then receives these orders all within a period of a few months. If the Post Office could not impound those mail orders, they would all be received and filled before the administrative proceedings could be completed. At that point, the mail order operator would be completely indifferent to whatever result may be reached at the administrative hearing. He need only resume operations with a new name and address.

That the Appellee has operated her business in this fashion for some years is apparent from the affidavit of an assistant Solicitor of the Post Office Department. [T. R. 41-48.] It is further shown by the affidavit of a Post Office Inspector that the final order of the Post Master General made in this case would have been almost totally ineffective had it not been for the prior impound order, inasmuch as approximately 98% of the mail addressed to Appellee was received by the Post Master at Los Angeles prior to the time of making the final order. [T. R. 49-53.] These affidavits were attached as exhibits to Appellant's reply to the Order to Show Cause and were filed with the District Court.

II.

The Order of the Postmaster General Is Supported by Substantial Evidence.

It is elementary that obscenity is a factual question and therefore committed to the discretion of the Post Office Department.

United States v. Dennett, 39 F. 2d 564 (2d Cir., 1930);

United States v. Levine, 83 F. 2d 156 (2d Cir., 1936);

United States v. Two Obscene Books, 99 F. Supp. 760 (N. D. Cal., 1951).

The proposition is also well established that questions of fact, when decided by an administrative agency, must be affirmed by the District Court when supported by substantial evidence.

National Conference On Legalizing Lotteries v. Farley, 96 F. 2d 861 (C. A. D. C., 1938);

Farley v. Heininger, 105 F. 2d 79 (C. A. D. C., 1939).

The Appellee's advertising circulars were attached as exhibits to the initial decision of the Post Office Hearing Examiner [T. R. 11-19] which was attached as an exhibit to the Appellee's Complaint and to the Appellant's written reply to the Order to Show Cause filed in the District Court. It is not contended by Appellant that the circulars themselves are obscene, but it is submitted that they constitute substantial evidence that the Appellee was and is using the mails to disseminate information as to where, how, and from whom obscene, lewd, lascivious, in-

decent, filthy and vile articles, matter, things, devices and substances may be obtained.

The decision of the District Court, however, goes further than to hold that there is no substantial evidence, and holds that the advertising circulars are no evidence of the nature of the things they describe, and that the advertising circulars are therefore no evidence of the fact that they give information as to where, how, or from whom obscene material may be obtained. It is true that at the time the Postmaster General made the order in question he had not obtained nor seen any of the things which the Appellee was offering for sale. He had, however, examined the Appellee's advertising circulars in which the Appellee has aptly and artfully described her wares. Therein the Appellee offers to send to the reader of the circular any number of hundreds of books and pictures, all of which deal with the subject of sex, and each of which is promised to give the recipient thereof a "thrill."

We are thus faced with what appears to be a rather novel situation in that it does not seem to have been presented to the Courts, or at least is not the subject of any reported decision. There are, however, many related cases which may be of assistance to the Court in deciding the question.

First, it is important to bear in mind that the act complained of here is not the actual sending of obscene material through the mail, but rather the sending of information as to where, how, or from whom the same may be obtained. 39 U. S. C. A. 259(a), under which the Postmaster General acted here, is a relatively new statute and the Courts have had little opportunity to construe it. It is patterned, however, after 18 U. S. C. A. 146, which

has been in effect for many years and has been interpreted on many occasions. In respect to the latter criminal statute, it appears to be well established that an offense is complete upon the mailing of information as to where, how or from whom the obscene material can be obtained.

Grimm v. United States, 156 U. S. 604, 39 L. Ed. 550, 15 S. Ct. 470 (1895);

DeGignac v. United States, 113 Fed. 197 (7th Cir., 1902).

In those cases, of course, the only question before the Court was the sufficiency of an Indictment based on this portion of the statute. The information which had been sent through the mails was not in itself obscene and did not show on its face that the material it referred to would be obscene. To sustain a prosecution, then, it would be necessary for the Government to prove at the trial that the material, as to which information was given, was in fact obscene.

The case at bar is quite different, however. Here the Appellee has not merely mailed an innocuous letter indicating simply, where, how or from whom books and pictures can be obtained. In this case she has gone to great lengths to describe the materials. Her descriptions of the materials are evidence of the nature of the materials and are substantial evidence of the fact that these materials are obscene.

See also, the following cases in which advertising circulars somewhat similar to those involved in the instant case were held to be obscene in and of themselves:

Burstein v. United States, 178 F. 2d 665 (9th Cir., 1950);

O'Neil v. United States, 56 F. 2d 51 (71 Cir., 1932).

There is still another line of cases which may be of assistance to the Court here. These relate to a different portion of the same criminal statute referred to above (18 U. S. C. A. 1461) and to another criminal statute regarding the postal laws (18 U. S. C. A. 876). These statutes make it a crime to send through the mail a letter attempting to extort money or giving information as to where, how or from whom a device may be obtained which will be used to prevent conception.

Gilbert v. United States, 182 F. 2d 316 (5th Cir., 1950);

United States v. Pignatelli, 125 F. 2d 643 (2d Cir., 1942);

Ackley v. United States, 200 Fed. 217 (8th Cir., 1912;

Bates v. United States, 10 F. 2d 92 (C. C. A. Ill., 1881).

In these cases the offense is complete upon the mailing of the letter which makes the threat or gives the information as to the obtaining of the device. It is immaterial that the defendant may not intend or may not be able to carry out the threat. Similarly, it is no defense to show that the device will not in fact prevent conception. In these cases the Courts have taken the view that when a person has mailed something which states that he will do something to extort money, or that he will make available a device to prevent conception, then he is bound by his statement.

In the instant case, it would seem that the Appellee has placed herself in the same position. By vividly describing in her advertising circulars the materials which she offers for sale, she has, in the words of the statute, sent through the mails information as to where, how, and from whom obscene, lewd, lascivious, indecedent, filthy, and vile articles, matter, things, devices, and substances may be obtained.

But perhaps the question can be examined in still another manner. Looking again to 18 U. S. C. A. 1461, we find that the term "indecent" (which in that statute is included in the definition of obscenity) includes "matter of a character *tending* to incite arson, murder, or assassination." (Emphasis supplied.) What would be the situation if one person were to send through the mail a letter to another stating that he had a plan to commit arson, murder, or assassination and urging that they confer for the purpose of carrying it out? Such a communication would clearly seem to be within the prohibition of the statute. How then does this differ from the situation wherein a person sends through the mail a circular stating that he has obscene matter which he will make available? The tendency to the unlawful purpose would seem to be the same in either stiuation.

Conclusion.

The decision of the District Court should be reversed on both grounds:

1. The Postmaster General had and has authority to issue the impound order.

2. The final order of the Postmaster General is supported by substantial evidence.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney,
Chief, Civil Division,

JOSEPH D. MULLENDER, JR.,
Assistant United States Attorney,
Attorneys for Appellant.

APPENDIX.

In the United States District Court for the Eastern District of Oklahoma.

Pink Williams, also known as "Cowboy" Pink Williams, Plaintiff, v. Carl Petty, Postmaster, Caddo, Oklahoma, Defendant. No. 3655-Civil.

Filed Jan. 7, 1954.

Memorandum.

Plaintiff seeks an order temporarily restraining defendant, as Postmaster at Caddo, Oklahoma, from "continued impounding mail addressed to Box 157, Caddo, Oklahoma * * * until further order of this Court, and for an order directing defendant to release all of plaintiff's mail * * *." The relief sought is against the defendant as postmaster. Plaintiff, without alleging any facts out of which this controversy arose, alleges that the postmaster's act "in impounding plaintiff's mail is arbitrary, capricious, unlawful, wrongful, and in strict violation of plaintiff's constitutional rights."

A hearing on plaintiff's application was set for December 30, 1953, at which time Honorable Frank D. McSherry, United States Attorney for the Eastern District of Oklahoma, acting by direction of the Attorney General of the United States, filed on behalf of the defendant postmaster a Motion to Dismiss, or, in the alternative, for Summary Judgment. In support of said motion there was attached certified copies of pleadings in a certain proceeding pending in the Post Office Department on a complaint filed by the Solicitor of the Department seeking a postal fraud order against the plaintiff. The complaint filed by the Solicitor of the Post Office Department alleged

that Pink Williams, Caddo, Oklahoma, used a fictitious, false or assumed name "Cowboy" at Caddo, Oklahoma, and charged him with a violation of 39 United States Code, Sections 255 and 259(a), and of 18 United States Code, Sections 1342 and 1361.

In the complaint filed by the Solicitor it was alleged that there was probable cause to believe that Pink Williams, Caddo, Oklahoma, was using a fictitious, false or assumed name "Cowboy" at Caddo, Oklahoma, in conducting and carry on, by means of the United States Mails, a scheme for obtaining and attempting to obtain remittances of money for a certain printed card of a filthy nature concerning a fictitious "cattlemen's Convention," and that he was disposing of, or causing to be disposed of, in the mails information as to where, how and from whom the said card might be obtained.

On November 17, 1953, Acting Postmaster General issued an order directing the Postmaster at Caddo, Oklahoma, to "refuse to deliver such mail to the party claiming same until his identity and the character of business conducted thereunder is satisfactorily established upon evidence which will be received at a hearing to be held in the Post Office Department upon such date as shall be fixed by the Chief Hearing Examiner, and such mail shall be held in your custody until my further order."

Plaintiff appeared in the proceedings mentioned above and filed an answer to the complaint of the Solicitor.

Accompanying the Motion to Dismiss is the affidavit of James C. Haynes, Jr., Chief Hearing Examiner of the Post Office Department, from which it appears that a hearing was held on the charges on December 3, 1953. That at the conclusion of the hearing Mr. Williams,

through his counsel requested and was granted until December 28, 1953, to file a brief. That counsel's attention was called to the fact that his client's mail would be impounded pending the decision and that "he made an expression of assent thereto."

Under the rules of practice of the Post Office Department, and the provisions of the Administrative Procedure Act, 5 U. S. C. 1009, an appeal from the decision of the Hearing Officer may be taken to the Postmaster General.

Plaintiff's complaint was filed in this Court on December 9, 1953. Whether or not be has filed a brief in the proceedings being conducted in the Post Office Department was not disclosed at the time of the hearing. But it does appear that the question is still pending before the Post Office Department.

Plaintiff's counsel, when the Motion to Dismiss, or, in the alternative, for Summary Judgment was filed, elected to proceed and present the question without filing any response to the affidavit in support of the motion; consequently, all facts alleged in support of the motion are accepted as true.

Defendant contends primarily that until the administrative proceedings pending in the Post Office Department are finally concluded, this Court has no jurisdiction, and that the Postmaster General is an indispensable party to this proceeding.

The Administrative Procedure Act provides for judicial review of any agency action, as well as the scope of the review. Courts generally hold that only final action is reviewable and that before resort to judicial relief may be had the administrative relief must have been exhausted. Citing Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41; McCauley v. Waterman Steamship Corp., 327 U. S.

540; Federal Power Commission v. Arkansas Power & Light Co., 330 U. S. 802; Mallory Coal v. National Bituminous Coal Commission, 99 F. 2d 399-408.

Plaintiff's contention, as I understand it, is that the Postmaster General has no authority under 39 U. S. C. A. 259-259(a) to impound mail pending a hearing on a complaint seeking a postal fraud order, but that he is authorized only upon issuance of a fraud order to "instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, partnership or association to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe."

Actually, plaintiff's attack is upon the order of the Postmaster General directing the Postmaster at Caddo to impound plaintiff's mail, and his effort is to enjoin the local postmaster from obeying the order of the Postmaster General, and requesting that this Court order him to deliver the mail contrary to the order of the Postmaster General. The contention is based on the proposition that before a postmaster may withhold mail addressed to an individual he must have some statutory authority for his act, and, unless there is such authority, his act is without authority of law and therefore invalid. To a great extent he relies upon the case of Donnell Manufacturing Co. v. Wyman, Postmaster at St. Louis (Circuit Court Eastern

District of Missouri), decided in 1907, and reported in 156 Fed. Rep. at page 415. Therein the Court held that the postmaster could not withhold mail for a period of six weeks, but the Court stated therein that "this Court does not now hold that the Postmaster General cannot make all needful orders pending the hearing and in furtherance of the hearing," referring to a hearing on a proposed fraud order. The decision seemed to turn upon the conception that there had been unreasonable delay in concluding the hearing. The Government called attention to an unreported case from the Southern District of California, Central Division, Lee A. Wallace a/k/a W. A. Lee v. Fanning, in which Judge Leon R. Yankwich held that "the Postmaster General had a reasonable time, while instituting administrative proceedings and holding a hearing on the evidence, to impound the mail addressed to W. A. Lee * * *." While it is true that the Act of Congress in question does not specifically say that the Postmaster General may, pending a hearing on a proposed fraud order, instruct the local postmaster to impound the mail, it is my judgment that the authority to impound mail pending a hearing is implicit in the authority of the Postmaster General to direct that the mail be returned to the original sender after a fraud order is issued.

Congress has placed the responsibility for protecting the mails upon the Postmaster General. It would certainly greatly hinder and handicap him in the administration of his duties in that regard to hold that he cannot, pending a hearing on whether or not a fraud order should issue, direct the local postmaster to withhold mail which is the subject-matter of the investigation. This Court is not now concerned with the merits of the controversy between the plaintiff and the Post Office Department. The

truth is that the facts giving rise to the controversy are not disclosed by the pleadings in the action, nor were they discussed by either party in presenting the motion now under consideration. It is not the purpose of the Court to express or intimate any opinion as to the merits of the controversy between the plaintiff and the Postmaster General.

If, as a result of the hearing in the Post Office Department, no fraud order issues, it necessarily follows that the plaintiff's mail will be delivered to him. In the event a fraud order issues and, subsequently, an appeal is approved by the Postmaster General, the plaintiff may than resort to the courts for relief, not only as to the issuance of the fraud order, but may seek relief from the order impounding the mail pending the issuance of the order.

In this case there has been no unreasonable delay. The proceedings were filed in the Post Office Department on November 16, or 17, 1953, and a hearing was granted plaintiff on December 3, 1953. The delay in the administrative proceedings since December 3 was occasioned by the action of the plaintiff. So long as there is no unreasonable delay in the administrative proceedings, resulting from the acts of those conducting the proceedings, plaintiff may not invoke the jurisdiction of this Court to obtain relief from the type of order involved herein.

The Motion of the Postmaster General to Dismiss is, therefore, SUSTAINED on the ground that the plaintiff's action is premature.

Order in conformity with the foregoing views is entered.

/s/ EUGENE RICE
Judge.

Barel v. Fiske.

U. S. Dist. Ct., S. D. N. Y., March 1, 1954.

SUGARMAN, D. J. Plaintiff seeks a temporary injunction restraining the Postmaster of Mount Vernon Station, New York, from continuing to impound mail addressed to Gem Company in Mount Vernon.

It appears that after an investigation conducted by postal inspectors, the Postmaster of Mount Vernon was "instructed" by one of said inspectors on January 29, 1954, to withhold Gem Company's mail pursuant to 39 C. F. R. 36.10.

On February 16, 1954, after further investigation by the postal authorities, the Gem Company was served with a complaint directing it to show cause at a hearing to be held on March 5, 1954, pursuant to 39 C. F. R. 151.1, *et seq.*, why it should not be debarred from the receipt of mail. The defendant herein was, on February 18, 1954, ordered to continue to impound Gem Company's mail pending termination of that administrative hearing. Thus, defendant has withheld plaintiff's mail since January 29, 1954.

The record discloses that there is sufficient evidence to sustain the preliminary administrative conclusion that the mails are being here used unlawfully (18 U. S. C., §1341) by a person using a fictitious name. (18 U. S. C., §1342.)

Gem Company has not yet been satisfactorily identified. In the course of plaintiff's attempt to identify himself with Gem Company, he conceded that while he nominally owned Gem Company, that business was "controlled by Chelli Promotions, President Nat Sokol . . ." Plaintiff's

contradictory statements as to the identity of Gem Company justified the Postmaster General's conclusion of failure "to appear and be identified" as required by the statute. (39 U. S. C., §255.) Until compliance with the statutory mandate of appearance and identification the continued impounding of Gem Company's mail was justified on that basis alone and was not an abuse of administrative authority.

However, assuming *arguendo* that plaintiff Barel has sufficiently identified himself with Gem Company as he claims, the Postmaster General has the authority to impound suspect mail matter pending decision of the question whether the mails are being used unlawfully. Pink Williams v. Petty (D. C. E. D., Okla.), Civ. 3655, Decision of Judge Rice, not yet reported. Of course this refusal to deliver a person's mail must be based upon substantial evidence to sustain preliminary administrative finding that there is a fraudulent scheme operating through the postal facilities. I cannot say that the evidence on which the postal authorities acted in the instant case is insufficient as a matter of law to justify their findings. Nor does it appear that the hearing has been noticed for an unreasonably late date. (*Cf.*, Donnell Mfg. Co. v. Wyman, 156 Fed. 415.)

Accordingly, the motion for a temporary injunction is denied.

No. 14546.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, State of California,

Appellant,

vs.

V. E. STANARD, individually and doing business as MALE MERCHANDISE MART,

Appellee.

BRIEF FOR APPELLEE.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Reports

No. 14546.

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Appellee.

BRIEF FOR APPELLEE.

Counterstatement of the Case.

The appellant's statement of the case is confusing, incomplete and inaccurate and a counterstatement is therefore essential. Appellee, V. E. Stanard, is engaged in the business of distributing and selling through the mail certain publications, pin-up pictures and novelties under the firm name and style of Male Merchandise Mart. On March 1, 1954, the Solicitor of the Post Office Department issued a complaint against plaintiff charging that she was carrying on, by means of the Post Office, a scheme for obtaining money for articles of an obscene character. On March 1, 1954, without notice or hearing

and before there had been any determination of illegal activity on the part of appellee, appellant Otto K. Olesen, under orders of the Deputy Postmaster General, impounded and refused to deliver to appellee any mail addressed to her [T. R. 60]. Appellee answered the Solicitor's complaint and denied the charge. On March 10, 1954, a hearing was held in Washington, D. C. None of the books, motion picture films, playing cards, color slides or other items described in the complaint as being obscene were offered or received in evidence. Circulars mailed by the plaintiff were offered in evidence in the said administrative hearing, but it was not charged or found that the circulars themselves were obscene. "It is not contended by appellant that the circulars themselves are obscene . . ." (Appellant's Op. Br. p. 10). On April 30, 1954, the Hearing Examiner filed his initial decision and found that appellee was selling or attempting to sell obscene books, motion pictures, playing cards and other items described in the complaint. On June 11, 1954, the Deputy Postmaster General issued a decision affirming and adopting the initial decision of the Hearing Examiner, and on the same day the Deputy Postmaster General issued an order addressed to appellant, Otto K. Olesen, directing him to return to the senders all mail matter addressed to the appellee with the word "Unlawful" written or stamped on the outside thereof [T. R. 60-61]. From March 1, 1954 to June 11, 1954, appellant refused to deliver to appellee her mail pursuant to the impound order of March 1, 1954. From June 11 to August 16, 1954, appellant refused to deliver to appellee her mail pursuant to the final administrative order of June 11, 1954.

The District Judge found that there was no evidence in the administrative hearing that any of the materials sold or offered for sale by appellee was obscene, lewd, lascivious, indecent, filthy or vile [T. R. 61]. He, therefore, held the final order of June 11, 1954 invalid and void for the reason that it was unsupported by substantial or any evidence and was arbitrary, capricious and an abuse of discretion and not in accordance with law [T. R. 62]. He also held invalid the impound order dated March 1, 1954 for the reason that there was no authority for the issuance of such an order without notice or hearing.

Questions Presented.

1. Does the Postmaster General have the power to issue an order without notice or hearing withholding from the appellee her mail.

(a) In the face of the due process clause of the Fifth Amendment?

(b) In the face of the Administrative Procedure Act?

2. Can the Post Office Department, consistently with the Administrative Procedure Act, find that appellee is mailing obscene matter when the Hearing Examiner has not even seen the matter or taken evidence regarding the contents thereof and where there is no claim that the circulars advertising the same are obscene?

The constitutionality of 39 U. S. C. A. Sec. 259a is not here put in question because the District Court refrained from considering that issue.

ARGUMENT.

I.

The Postmaster General Was Without Power to Issue the Impound Order.

A. The Due Process Clause of the Fifth Amendment.

About a year ago, Mr. Justice Douglas considered the entire problem raised in this case in *Stanard v. Olesen,* 74 S. Ct. 768. The decision is so apt that it is attached hereto as an appendix. In his decision Mr. Justice Douglas said:

> "The power of the Post Office Department to exclude materials from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee."

In *Walker, Postmaster General v. Popenoe,* 149 F. 2d 511, Mr. Justice Arnold, concurring and speaking for the court, pointed out that to deprive a person of the use of the mails is like preventing a seller of goods from using the principal highways which connect him with his market, and held that a full and fair hearing is a condition precedent to any interference with the use of the mails. Of particular significance to the case at bar is the following paragraph from Mr. Justice Arnold's opinion:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intention-

ally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail, the condition of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here. Appellants have been prevented for a long period of time from mailing a publicatoin which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury."

In a law review note (28 Vir. L. Rev. 635) entitled "The Postal Power and its Limitations on Freedom of the Press" is quoted a part of a letter from Mr. Justice Holmes to Sir Frederick Pollock, which reads as follows:

> "The Postmaster General stops letters and circulars that he (*i. e.,* generally I suppose some understaffer) decides to be fraudulent, etc., the Constitution forbids any law abridging the freedom of speech and I can't believe that this stoppage is lawful. I think in fact that it has been an instrument of tyranny and used to stop communications that would seem all right to a different mode of thought."

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, the Supreme Court struck down an administrative order which was made without notice or hearing

on the ground that it did not proceed with due process of law. In that case Mr. Justice Douglas said:

> "It is procedure that spells much of the difference between rule by law and rule by whim and caprice."

And Mr. Justice Frankfurter observed that:

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore protect fairness, and fairness can rarely be obtained by secret one-sided determination of facts decisive of rights."

B. The Administrative Procedure Act.

For many years it has been settled law that the Post Office Department has no power to impound mail pending administrative hearing.

> *Donnell Mfg. Co. v. Wyman,* 156 Fed. 415;
> *Myers v. Cheeseman,* 174 Fed. 783.

In the *Donnell* case, the court said:

> "If the Postmaster General . . . had the authority to withhold complainant's mail for six weeks of time it was by reason of some statute. And on the hearing in this court counsel for the government was wholly unable to present such a statute for consideration, and the most diligent search by the court has been with the same results. Apparently it can be said that there is no such statute and therefore no such authority exists."

In *Stanard v. Olesen, supra,* Mr. Justice Douglas said:

> ". . . I find no statutory authority of the Post Office Department to impound mail *without a hearing and before there has been any final determination of illegal activity.*" (Emphasis in original.)

It is also settled law that the Post Office Department must proceed in accordance with the provisions of the Administrative Procedure Act.

Cates v. Haderlein, 342 U. S. 804;

Door v. Donaldson, 195 F. 2d 764;

Stanard v. Olesen, supra.

In the *Stanard* case Mr. Justice Douglas said:

> "Under the laws presently written, every business, until found unlawful, has the right to be left alone."

The Administrative Procedure Act (5 U. S. C. Sec. 1001 *et seq.*) provides that no sanction shall be imposed except within jurisdiction delegated to the agency and as authorized by law.

As Mr. Justice Douglas said in the *Stanard v. Olesen* case:

> "Impounding one's mail is plainly a 'sanction' for it may as effectively close down an establishment as the sheriff himself. The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office, as I have said. It carries such a grave threat, it touches so close to First, Fifth and Sixth Amendment rights, it has such serious possibilites of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order from which petitioner seeks relief is invalid."

The cases cited by appellant in his brief (p. 10) and the policy arguments urged were considered and rejected by Mr. Justice Douglas in *Stanard v. Olesen, supra.* He pointed out that legislation has been introduced, but

not passed, to give the Post Office Department the power it here claims. H. R. 569, 83d Cong., 1st Sess. He then observed that:

> "The history of that bill and of related legislations does not show any awareness that the power proposed already exists. See H. R. Rep. No. 850, 83d Cong., 1st Sess.; H. R. Rep. No. 1874, 82d Cong., 2d Sess.; H. R. Rep. No. 2510, 82d Cong., 2d Sess."

II.

The Final Order of the Postmaster General Is Not Supported by Substantial or Any Evidence.

The appellee was found by the Post Office Department to be selling or attempting to sell obscene matter through the mail. This in spite of the fact that none of the matter mailed by appellee was introduced into evidence. The theory of the agency as set forth in the initial decision is that:

> ". . . the circulars themselves constitute persuasive evidence that respondent will furnish obscenity to persons induced by the descriptive technique employed therein to order the books, pictures, playing cards and other materials offered for sale. If these circular advertisements promise obscenity, as I hold they do, it is not unfair to hold the advertiser bound by his advertising. *If the materials, as actually furnished, are in fact innocuous and non-obscene,* the advertiser should have only himself to blame for going to such extreme lengths, as is done in these circulars, to persuade his addressees to the opposite impression. Thus, the effect of these circulars is to bring this enterprise, *prima facie* at least, within the inhibition of the postal obscenity statute. Respondent did not elect to present evidence to rebut

the promise of obscenity so clearly and unmistakably spelled out in the advertising circulars. I hold that the advertising circulars constitute substantial evidence of sale or attempted sale of obscene books, motion pictures, playing cards and other items mentioned in the complaint. . . ." [Emphasis added; T. R. 16-17.]

The reason why the Post Office Department saw fit not to introduce the material mailed by appellee is suggested in the following testimony given before the Select Committee on Current Pornographic Material, House Report 2510, 82d Cong., 2d Sess., page 95:

"Mr. Burton: Is there any other typical case that you think would be of interest to the Committee? You have described your operations so very clearly here—

Mr. Simon: Well we have cases where they give the impression that they, from the literature you get the impression that they, are selling obscene matter, but when the material is received it turns out to be *innocuous,* and several of these cases have resulted in the issuance of fraud orders. That type of case gives us considerable trouble, along with the borderline material.

Mr. Burton: That is the type that you call fake advertising?

Mr. Simon: Fake obscene." (Emphasis added.)

In the course of the same hearing, then Solicitor Frank testified as follows, on pages 94-95:

". . . Sometimes you can get five people together with you and can give them five pieces of mail, and ask them to mark them, and you will get five different results, because in some cases it is just

one of those things that depends on your own personal ideas and your own bringing up; it depends on how strongly you feel about things and there are some types of that material that you just can't get two people to agree on no matter how reasonably and how objectively they look upon it. It is just an honest difference of opinion. We experience it all the time, so we have our conferences, and we decide what is going to be the best thing to do.

Mr. Burton: These cases are frequently called your borderline cases are they not?

Mr. Frank: Borderline cases that is right and I may say there are many of them, Mr. Counsel.

Mr. Keefe: In mentioning borderline if I may just inject here, I think that is the group that, without any doubt, gives us the most complaint, give us the most trouble, because the real pornographic material is not specifically advertised, as we mentioned before, but the man who floods the mails with these ads, he is dealing many times with an article that he knows is going to cause a lot of trouble, I mean trouble in deciding on it, and very difficult of a criminal prosecution, and those are the things, I think, all the way along, that we are having our great trouble with.

"We have no trouble with prosecution on things that are definitely obscene, but it is this material that is this way and that way that is very, very difficult to prosecute."

The trial court discussed the evidence question as follows [T. R. 57-58]:

"No evidence of any kind was offered or received before the Post Office Department to support the conclusion that the matter for which the use of the mail was forbidden by the order, is within the

> prohibition of the statute; none of such matter was offered or received. The circulars advertising the material were the only things received, and they are specifically found not to be within the prohibited terms of obscenity, etc., of the statute. For the Solicitor of the Post Office Department and the Postmaster General to find that something is obscene, lewd, lascivious, indecent, filthy or vile without even seeing it or a copy or a facsimile of it, contemplates that Congress intended that the right to use the mails should be subject to some government administrator's power of divination or clairvoyance. Such powers are not recognized in any act of Congress I have ever seen. Chief Justice Hughes in United States v. MacIntosh, 283 U. S. 605, spoke of departmental zeal outrunning statutory authority. I have seen many examples of it, but none so arbitrary as the instant order."

Before the statute, Section 259a, could become operative, the Post Office Department would have to find that appellee was mailing obscene matter. Section 7(c) of the Administrative Procedure Act (5 U. S. C. A. Sec. 1001 *et seq.*) provides that "The proponent of a . . . order shall have the burden of proof." As observed above, the administrative agency never examined the matter which it found to be obscene and conceded that the matter might in fact be "innocuous and non-obscene." [T. R. 16-17]. In order to bridge the gap, the Post Office Department *presumed* that the matter was obscene. If the appellee was mailing obscene matter, she was guilty of a crime (18 U. S. C., Sec. 1461). There is no presumption that a person violates the law; quite the contrary the presumption is that a person is free of wrongdoing (Code Civ. Proc. 1963). It is just as erroneous to presume that

a person is sending obscene matter through the mail as it is to presume that a person is guilty of a fraud. (See *Jeffries v. Olesen,* 121 Fed. Supp. 463; *The Atlanta Corp. v. Olesen,* 124 Fed. Supp. 482.)

Appellant argues in his brief (p. 10)

> "That questions of fact, when decided by an administrative agency, must be affirmed by the District Court when supported by substantial evidence."

These findings, however, are of course subject to judicial review.

United States v. Morton, 338 U. S. 632;

Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474;

Bonica v. Olesen, 126 Fed. Supp. 398.

In the case at bar the administrative agency found that the appellee was mailing obscene matter, without ever having seen the matter it declared obscene. The District Court properly found that there was no evidence to support the finding that the appellee was mailing obscene matter [T. R. 61].

In *Bonica v. Olesen,* 126 Fed. Supp. 398, the judge said:

> "It appears that the only controverted issue with the administrative level was whether or not the films were 'obsecene, lewd or lascivious' and that the only evidence on this crucial question was the films themselves."

The court then went on to describe the films and concluded that the Post Office was in error in finding them obscene, saying:

> "The Post Office has labeled these movements 'sexually suggestive.' To so conclude would be to

classify the great bulk of modern dancing as such. This court cannot conclude that this is the community consensus."

In the case at bar, how can this or any court pass judgment on whether or not the appellee was mailing obscene matter. The matter is not before the court and it is not before the court because the Post Office Department saw fit not to introduce it. Under the circumstances, the trial court's finding is conclusive.

A recent helpful case is *Summerfield v. Sunshine Book Co.,* 23 Law. Week 2285 (Dec. 16, 1954, Ct. of App. for the Dist. of Col., not yet officially reported). In that case the court said:

> "It may perhaps be argued that the sweeping orders here involved should be upheld—contrary to all the inferences to be drawn from The Reed Magazine case—on the ground that from past unlawful conduct of (publications) as the Postmaster General sees it, he may conclude that such conduct will continue and that he will again have cause to find future issues of the magazine obscene. But there is and can be no finding now that any particular future issue of the . . . magazines will be obscene and will provide a basis for the sanctions which the Postmaster General may impose under Section 259a. To let the present order stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities. Grave constitutional questions would then be presented." (See also *Reilly v. Pincus,* 338 U. S. 269.)

As if there were something wrong with sex, the appellant argues in his brief (p. 11):

> ". . . Appellee offers to send to the reader of the circular any number of hundreds of books and pictures, all of which deal with the subject of sex, and each of which is promised to give the recipient thereof a 'thrill'."

Much as the Post Office Department would like to abolish sex, it is here to stay and judicially accepted.

Hannagan v. Esquire, Inc., 327 U. S. 146;
State v. Lerner, 81 N. E. 2d 282;
Commonwealth v. Gordon, 166 Pa. Sup. 120;
Bantam Books v. Melko, 96 A. 2d 42;
American Museum of Natural History v. Keenan, 89 A. 2d 98;
Parmelee v. United States, 113 F. 2d 729;
Le Baron v. Olesen, 125 Fed. Supp. 53.

An eloquent judicial tribute to sex is found in *State v. Lerner,* 81 N. E. 2d 282, 286:

> "Pure normal sex ideas are all right. All of mankind have sex ideas. Nature is aflame with sex ideas—the hoot of the owl, the coo of the dove, the blossoms of the flowers, plants and trees, the spawning of the fish. Sex is the why and wherefore of life and living."

Conclusion.

The decision of the District Court should be affirmed on both grounds.

Respectfully submitted,

BROCK, EASTON & FLEISHMAN,
By STANLEY FLEISHMAN,
Attorneys for Appellee.

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California; and DOE I Through DOE IV,

Appellees.

Application to Mr. Justice Douglas for Relief From Post Office Department Impound Order Pending Appeal; or in the Alternative for an Injunction Pending Appeal. [May 22, 1954.]

OPINION OF MR. JUSTICE DOUGLAS.

Petitioner operates her business in Hollywood, California, under the fictitious name "Male Merchandise Mart," which has been duly recorded with the state authorities. Her business is selling and distributing through the mails "publications, 'pin-up' pictures and novelties." On March 1, 1954, the Solicitor for the Post Office Department issued a complaint against her, charging that she was carrying on, by means of the Post Office, a scheme for

obtaining money for articles of an obscene character; and further charging that she was depositing in the mails information as to where such articles could be obtained, all in violation of 39 U. S. C., §§255 and 259(a), 18 U. S. C., §§1342 and 1461.

On the same day on which the complaint issued, the Deputy Postmaster General ordered the Postmaster at Los Angeles, California, to refuse to deliver mail addressed to petitioner at her business address. The order stated that a complaint of unlawful use of the mails had been filed, that a hearing would be held to establish whether there were any violations of the applicable statutes, and that the mail addressed to petitioner should be impounded until further order. This order is now in effect. It was issued without notice or hearing.

Petitioner answered the complaint and a hearing was held in Washington, D. C., in March, 1954. At the present time, there has been no final adjudication, administrative or otherwise, that petitioner has violated any statute.

On March 19, 1954, petitioner filed an action for declaratory relief in the District Court for the Southern District of California. She alleged that the Post Office had no power to impound her mail without a hearing, that she was suffering irreparable injury, and that her constitutional rights had been violated. She sought a decree enjoining the so-called impound order, hereinafter referred to as the interim order, and any other order which might be entered by the Post Office, pursuant to the hearing. The District Court dismissed the complaint, holding that the Post Office had power to impound petitioner's mail pending the administrative determination,

and that petitioner could not question the administrative proceeding itself, because she had not exhausted her administrative remedies. Petitioner appealed to the Court of Appeals for the Ninth Circuit, where the appeal is now pending. She also made a motion for relief from the interim order, pending review. The Court of Appeals heard argument on the motion and took it under submission, but then vacated the submission and ordered the motion held in abeyance until June 15, 1954, to permit the Post Office Department to make a final and judicially reviewable order. The court stated that it was of the opinion that the motion should not be acted upon at that time.

Petitioner has now applied to me as Circuit Justice for relief from the interim order, until her appeal has been heard or the matter has been otherwise determined. I have heard the parties and have examined the papers presented. No question has been raised as to the power of a Circuit Justice to grant the relief requested, and I will assume that such power exists. *Cf.* MR. JUSTICE REED'S opinion in Twentieth Century Airlines v. Ryan, 74 Sup. Ct. 8, 98 L. Ed. 29. See also 5 U. S. C. §1009(d). I am not asked to interfere in any way with the administrative proceeding which is now being conducted. That proceeding is authorized by 39 U. S. C. §§255 and 259(a). If the administrative decision is adverse to petitioner, the Post Office will have statutory authority to intercept all mail addressed to her and either send it to the "dead-letter" office, or return it to the senders marked "Unlawful." Petitioner may have judicial review of any order entered under those statutes in an action brought after the administrative adjudication, if not in the case which is now pending in the Court of

Appeals. In the present application petitioner complains only of the interim order under which her mail is being intercepted while the administrative proceeding is being conducted. She complains that the interim order was entered without notice, without a hearing, and without any authority in law, statutory or otherwise.

The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and the Sixth Amendments guarantee. See the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in Leach v. Carlile, 258 U. S. 138, 140, and Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 417, 436; *cf.* Hannegan v. Esquire, Inc., 327 U. S. 146. I mention the constitutional implications of the problem only to emphasize that the power to impound mail should not be lightly implied. Yet if this power exists, it is an implied one. For I find no statutory authority of the Post Office Department to impound mail *without a hearing and before there has been any final determination of illegal activity.*

Nearly fifty years ago a district court held that there was no such statutory power, see Donnell Mfg. Co. v. Wyman, 156 F. 415. And see Myers v. Cheeseman, 174 F. 783. It has been held that the exercise of a like power without a hearing violated the Due Process Clause of the Fifth Amendment. Walker v. Popenoe, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513. A manual, published by the Post Office Department in 1939, stated that

there was no such power. See U. S. Post Office Department, Postal Decision, 328. A bill now pending in Congress would give such power, with certain judicial safeguards. H. R. 569, 83rd Cong., 1st Sess. The history of that bill and of related legislation does not show any awareness that the power proposed already exists. See H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 1874, 82d Cong., 2d Sess.; H. R. Rep. No. 2510, 82d Cong., 2d Sess.

The Department of Justice has presented strong policy arguments (both to the Congress and to the courts) that the power is necessary. Within the past year four district courts have accepted those arguments, including the District Court which passed on this case. For the reported decisions, see Williams v. Petty, 4 Pike & Fischer Admin. Law 2d 203; Barel v. Fiske, 4 Pike & Fischer Admin. Law 2d 207. There is something to be said on the side of the law enforcement officials. For if an illicit business can continue while the administrative hearings are under way, those who operate on a fly-by-night basis may be able to stay one jump ahead of the law. Yet it is for Congress, not the courts, to write the law. Under the law, as presently written, every business, until found unlawful, has the right to be let alone. The Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001 *et seq.*, gives some protection to that right. The power of the Post office Department to restrain the illegal use of the mails is subject to that Act. Cates v. Haderlein, 342 U. S. 804; Door v. Donaldson, 90 U. S. App. D. C. 188, 195 F. 2d 764. Section 9 of the Act furnishes some safeguards. It provides, "In the exercise of any power or authority—

"(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Impounding one's mail is plainly a "sanction," for it may as effectively close down an establishment as the sheriff himself. The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office, as I have said. It carries such a grave threat, it touches so close to First, Fifth, and Sixth Amendment rights, it has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order from which petitioner seeks relief is invalid. It seems to be a final order and there is no apparent administrative remedy.

It is clear, I think, that petitioner is entitled to judicial review of the interim order. Section 10 of the Administrative Procedure Act provides:

> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> . . . . . .
>
> "(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . ."

The interim order should be lifted only if it is invalid. If it is lifted, the issue of its validity will become moot, see Myers v. Cheeseman, *supra*. The case is now pending in the Court of Appeals and will be decided by that court in due course. The Department of Justice advises me that a final administrative order will be made very shortly, probably in two or three weeks. If that order should be favorable to petitioner, she would, of course, receive all her mail and the case would become moot. If the order is adverse to her, its validity can be reviewed by the Court of Appeals. I was assured on oral argument that any mail intercepted under the interim order would be impounded and kept separate from the other mail that is subject to the final administrative order, until judicial review is had, so that the separate issue of the validity of the interim order will be open on review. There is thus no danger that the issue presented by this application will become moot, if the decision of the Post Office goes against petitioner.

Petitioner presents a strong case for interim relief. Litigation, however, often places a heavy burden on the citizen; and he must frequently suffer intermediate inconveniences or losses to win his point. Since petitioner will, in due course, get judicial review of the important question of law tendered and since the action I am asked to take runs counter to the requirements of orderly procedure, I will deny the relief asked.

Application denied.

No. 14547.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GORDON SCHINDLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

No. 14547.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GORDON SCHINDLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on March 26, 1952 in ten counts under Section 1461 of Title 18, United States Code.

On May 19, 1952 the appellant was arraigned, entered a plea of Not Guilty to all counts of the Indictment, and the case was set for trial on January 13, 1953.

On January 13, 1953 appellant was tried in the United States District Court for the Southern District of California by the Honorable Harry C. Westover, sitting with

a jury, and was found guilty on Counts Five, Six, Seven, Eight, Nine and Ten of the Indictment. The jury was deadlocked on Counts One, Two, Three and Four.

On January 26, 1953 appellant's Motion for New Trial on Counts Five, Six, Seven and Eight was granted by the Honorable Harry C. Westover.

On February 9, 1954, appellant was retried in the United States District Court for the Southern District of California by the Honorable Leon R. Yankwich, sitting with a jury, and was found guilty on Counts One, Two, Three, Four and Six. [Tr. p. 5.][1]

On March 8, 1954 appellant was sentenced to a period of imprisonment of four months on Count One and was fined $1,000 on Count Two, and imposition of sentence was suspended on Counts Three, Four and Six, and the appellant placed on probation for a period of three years, the period of probation to begin upon the expiration of the sentence on Count One. [Tr. pp. 6-8.] Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 1461 of Title 18, United States Code and Section 3231 of Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

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[1]"Tr." refers to "Transcript of Record."

II.
STATUTES INVOLVED.

The Indictment in this case was brought under Section 1461 of Title 18, United States Code.

The Indictment charges a violation of Section 1461 of Title 18, United States Code, which provides in pertinent part:

> "§1461. Mailing obscene . . . matter.
>
> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III.
STATEMENT OF THE CASE.

The Indictment pertinent to this appeal charges as follows:

> "COUNT ONE.
>
> [U. S. C., Title 18, Sec. 1461.]
>
> On or about March 8, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, certain books addressed to 'Broadway News 44 E. Broadway

Tucson, Ariz.' which books were obscene, lewd, lascivious, and filthy, as the defendant then and there well knew, and too obscene, lewd, lascivious, and filthy to be made a part of the records of this court.

COUNT TWO.

[U. S. C., Title 18, Sec. 1461.]

On or about March 14, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain postal card addressed to 'P. B. Lindner 6338 E. Gallant Bell Gardens, Calif.' containing an advertisement and notice giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT THREE.

[U. S. C., Title 18, Sec. 1461.]

On or about April 21, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain postal card addressed to 'Waldo E. Trammel Box 670 North Bend, Ore.' containing an advertisement and notice giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy booklets might be obtained.

COUNT FOUR.

[U. S. C., Title 18, Sec. 1461.]

On or about May 9, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, certain books addressed to 'Alfred Welles Lovelock, Nevada' which books were obscene, lewd, lascivious, and filthy, as the defendant then and there well knew, and too obscene, lewd, lascivious, and filthy to be made a part of the records of this court.

COUNT FIVE.

[U. S. C., Title 18, Sec. 1461.]

On or about August 24, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain letter addressed to 'P. Bender Eminence, Ky.' containing advertisements and notices giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT SIX.

[U. S. C., Title 18, Sec. 1461.]

On or about August 29, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post

Office Establishment of the United States, a certain letter addressed to 'Vernon L. Aldridge Box 423 Patagonia, Ariz.' containing advertisements and notices giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT SEVEN.

[U. S. C., Title 18, Sec. 1461.]

On or about August 30, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain letter addressed to 'G. Marston Scottsdale, Ariz.' containing advertisements and notices giving information where, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT EIGHT.

[U. S. C., Title 18, Sec. 1461.]

On or about September 1, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain letter addressed to 'H. T. Elliott Box 278 Dublin, Va.' containing advertisements and notices giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained."

On May 19, 1952, the appellant appeared for arraignment and plea, represented by Caryl Warner, Esq., before the Honorable Ben Harrison, United States District Judge, and entered a plea of Not Guilty to all counts of the Indictment.

On January 13, 1953, the case was called for trial before the Honorable Harry C. Westover, United States District Judge, sitting with a jury, and on January 15, 1953, the jury returned a verdict of guilty as charged in Counts Five, Six, Seven, Eight, Nine and Ten of the Indictment. The jury was deadlocked on Counts One, Two, Three and Four.

On January 15, 1953, the Honorable Harry C. Westover, District Judge, declared a mistrial as to Counts One, Two, Three and Four.

On January 26, 1953, the Honorable Harry C. Westover, District Judge, granted appellant's Motion for New Trial as to Counts Five, Six, Seven and Eight. Appellant's Motion for New Trial as to Counts Nine and Ten was denied.

Appellant appealed Counts Nine and Ten in this Court in *Schindler v. United States,* decided November 30, 1953, and reported in 208 F. 2d 289. Petition for writ of certiorari was denied in the Supreme Court on April 5, 1954.

On February 9, 1954, the case was called for trial before the Honorable Leon R. Yankwich, sitting with a jury. Appellant was represented by Cecil W. Collins, Esq.

On February 10, 1954, the Honorable Leon R. Yankwich, District Judge, granted appellant's motion for judgment of acquittal on Counts Five, Seven and Eight.

On February 11, 1954, the jury returned a verdict of guilty as charged in Counts One, Two, Three, Four and Six of the Indictment.

On March 8, 1954, appellant was sentenced to imprisonment for a period of four months on Count One and to pay a fine of $1,000 on Count Two. Imposition of sentence was suspended on Counts Three, Four and Six and the appellant was placed on probation for a period of three years, the period of probation to commence upon the expiration of the sentence on Count One.

Appellant assigns as error the judgment of conviction on the following grounds:

A. The trial court erred in refusing to allow appellant's source books into evidence.

B. The trial court erred in refusing to admit the testimony of J. B. Tietz.

C. The trial court erred in its instructions on criminal intent.

D. Section 1461 of Title 18 is unconstitutional.

E. The verdict of the jury is (a) contrary to the law (b) contrary to the evidence and (c) contrary to the law and the evidence.

IV.
STATEMENT OF THE FACTS.

The facts pertinent to the appeal in this case are shown here in the form of Stipulation to Evidence entered into at the time of the trial by and between the Government and the appellant. [R. pp. 2-6.][2]

> "IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, plaintiff and GORDON SCHINDLER, defendant in the above-entitled matter, through their respective counsel as follows:
>
> That it shall be deemed true and duly proved by the plaintiff, as follows:
>
> I.
>
> That on or about March 8, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did, upon receipt of an order from Broadway News, deposit and cause to be deposited for mailing and delivery in the Post Office Establishment of the United States certain books addressed to 'Broadway News 44 E. Broadway Tucson, Ariz.' in an envelope, which books are entitled: 'Unusual Sex Practices,' 'Handbook for Husbands,' 'Auto-Erotic Practices,' 'Sex Perversion and the Law, Vol. I,' and 'Sex Perversion and the Law, Vol. II.'
>
> II.
>
> That on or about March 14, 1950, in Los Angeles County, California, within the Central Division of th Southern District of California, the defendant GORDON SCHINDLER, upon being solicited, deposited

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[2]"R." refers to Reporter's Transcript of Proceedings.

and caused to be deposited for mailing and delivery in the Post Office Establishment of the United States a certain postal card addressed to 'P. B. Lindner, 6338 E. Gallant, Bell Gardens, Calif.' containing an advertisement and notice giving information where, how, from whom and by what means certain books might be obtained, to-wit: 'Handbook for Husbands' and 'Auto-Erotic Practices.'

III.

That on or about April 21, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER, upon being solicited, deposited and caused to be deposited for mailing and delivery in the Post Office Establishment of the United States a certain postal card addressed to 'Waldo E. Trammel, Box 670, North Bend, Ore.' containing an advertisement and notice giving information where, how, from whom and by what means booklets might be obtained, to-wit: 'Handbook for Husbands' and 'Auto-Erotic Practices.'

IV.

That on or about May 9, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER, upon being solicited, deposited and caused to be deposited for mailing and delivery in the Post Office Establishment of the United States certain books addressed to 'Alfred Welles, Lovelock, Nevada,' which books are entitled: 'Handbook for Husbands' and 'Auto-Erotic Practices.' "

V.
ARGUMENT.

There Was No Error in the Refusal of the Trial Court to Allow Appellant to Introduce Into Evidence His Source Books.

Appellant herein cites as error the ruling of the trial court in excluding the books appellant claimed were the source for the books involved in the Indictment in this case. [R. pp. 33-34.]

The problem raised in this specification of error, therefore, can best be presented in the form of a question. Does the fact, if determined, that a source book, or a combination of source books, are not obscene, necessarily preclude a conclusion that a book taken from these sources is obscene? Reason and authority would require that the question be answered in the negative.

The case of *United States v. Bennett,* 24 Fed. Cases. 14571, answers the question in this manner when the court says:

> "In commenting on one of the passages which he read, the counsel for the defendant stated that he desired to read from another book, a clause of similar character, by way of showing 'how that sort of illustration or expression or narrative is regarded in standard literature.' The court excluded all reference to and illustrations from other books and publications, and the defendant's counsel excepted. We are unable to see that there was any error in their exclusion. It is the duty of the court to prevent the presentation to the jury of any issues other than the one on trial, and it did not tend to show that the marked passages in question was not obscene, that another passage in the book from which the marked

passage was quoted, or another passage in some other book, was not generally accepted as abscene."

This Court considered the question raised upon this appeal in *Schindler v. United States,* 208 F. 2d 289, cert. den. 347 U. S. 938. Therein this Court says, at page 290:

"Another book, called 'The Perfumed Garden,' was likewise excluded although it contained source material for the Arabian Manual. However its relevancy, if any, was too slight to render its exclusion prejudicial. The primary tendency of the excluded material was to clutter up and confuse the record, and we think the exclusionary ruling was well within the discretion of the trial judge."

There Was No Error in the Ruling of the Trial Court Refusing to Admit the Testimony of J. B. Tietz, Esq. on the Question of Intent.

This raises a question which was decided by this Court against this same appellant in the case of *Schindler v. United States,* 208 F. 2d 289, 290, cert. den. 347 U. S. 938, and therefore is not considered in this appeal.

There Was No Error in the Instructions of the Trial Court on Criminal Intent.

The trial court instructed the jury on the question of criminal intent as follows:

"In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

A person is held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend all the

consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.

An act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

The word 'willfully' does not mean merely voluntarily or intentionally. Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. It signifies an evil intent without justifiable excuse and is employed to characterize a thing done without ground for believing that it is lawful or conduct marked by careless disregard whether or not one has the right so to act." [R. p. 61, line 17, to p. 62, line 12.]

And further,

"A picture or printed matter is obscene, lewd lascivious or filthy within the meaning of the Statute that applies to this case if it is offensive to the common sense of decency and modesty of the community, and tends to suggest, or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the literature charged to have been obscene was, in fact, of that character. And, if such literature was obscene, and the defendant knew of the contents of such literature at the time he deposited the same in the mails, or caused the same to be deposited in the mails, it is not material that he, himself, did not regard such literature as obscene." [R. p. 62, line 23, to p. 63, line 10.]

Appellant's specification of error herein relies upon the case of *Morissette v. United States,* 342 U. S. 246. It is difficult upon a study of the *Morissette* case (*supra*) to see how appellant can find much comfort in the language and holding of that case.

At the outset it should be remembered that appellant through his counsel stipulated that he "did deposit and cause to be deposited for mailing" the material charged in the indictment. How, then, can he now complain that any other evidence on the question of intent is relevant or material? It could add nothing to the effect of the stipulation.

Further, it is submitted that the *Morissette* case *(supra)* is not applicable to the statute or situation here in question. The court in the *Morissette* case *(supra)* says at page 260:

> "A quite different question here is whether we will expand the doctrine of crimes without intent *to include those charged here."* (Emphasis added.)

From the language quoted above, it would appear the court was concerned only with the statute under attack in that particular case. That was a theft statute, 18 U. S. C., Sec. 641. The cases interpreting the necessary intent required by the statute involved in the instant case have uniformly held that knowledge *of the obscenity* of a book was *not* a necessary element to a violation of 18 U. S. C., Sec. 1461. *Rosen v. United States,* 161 U. S. 29; *Magon v. United States,* 248 Fed. 201, cert. den. 249 U. S. 618; *Burton v. United States,* 142 Fed. 57; *Knowles v. United States,* 170 Fed. 409. The necessary intent is merely the intent to mail the article mailed. This was stipulated by the appellant.

This Court considered and rejected appellant's theory in *Schindler v. United States,* 208 F. 2d 289, cert. den., 347 U. S. 938. In the *Schindler* case, this Court, at page 290, says:

> "Probably the leading case bearing on the point is Rosen v. United States, 161 U. S. 29, 41 S. Ct. 434, 438, 480, 40 L. Ed. 606. There the defendant unavailingly asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew that the application he had placed in the mails was obscene. The request, said the Supreme Court, was intended to announce the proposition that a conviction under the statute could not be had unless the individual charged with violation of it knew or believed that the paper he deposited could be properly or justly characterized as obscene or lewd. 'The statute,' said the Court, 'is not to be so interpreted.' And the Court went on to observe that Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge of its contents, assumed the responsibility of putting it in the United States mails. The authorities appear uniformly to support that view."

The trial court properly instructed the jury upon the question of the criminal intent necessary to convict the appellant and therefore, the judgment should be affirmed.

Section 1461 of Title 18, United States Code is Constitutional.

Appellant attacks Section 1461 of Title 18, United States Code as an unwarranted abridgement of rights guaranteed under the First Amendment of the Constitution of the United States. He primarily bases his attack upon the theory that the statute punishes acts

which are of no danger to "the safety of the nation." He claims a lack of a "clear and present danger."

It must be conceded at the outset that Congress was vested with the power "to establish post-offices and post roads." United States Constitution, Article I, Section 8, clause 7. As practically construed throughout the cases, this authorizes, not merely the establishment of a postal system, but also its regulation and protection. However, with this express grant of power must also be construed the limitations upon Congress in the enactment of laws "abridging the freedom of speech and of the press." United States Constitution, Amendment I.

The problem has been raised in a great number of cases. The Supreme Court in the case of *Ex parte Jackson,* 96 U. S. 727, was first presented with the question in regard to lottery tickets. The court in the *Jackson* case *(supra)* says at page 736:

> "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus by Act of March 3, 1873 Congress declared 'that no obscene, lewd, or lascivious book, pamphlet . . . shall be carried in the mail; . . .'
>
> All that Congress meant by this Act was, that the mail should not be used to transport such corrupting publications and articles, and that anyone who attempted to use it for that purpose should be punished . . . The only question for our determination relates to the constitutionality of the Act; and of that we have no doubt."

In construing a statute in substantially the same language as Section 1461 of Title 18, the court in the case

of *Tyomies Publishing Co. v. United States,* 211 Fed. 385, says at page 388:

> "The statute is not in derogation of the constitutional rights and privileges of the defendants as publishers of a daily newspaper. The constitutional guaranty of a free press cannot be made a shield from violation of criminal laws which are not designed to restrict freedom of the press, but to protect society from acts clearly immoral or otherwise injurious to the people. *Ex parte Jackson,* 96 U. S. 727, 736, 24 L. Ed. 877; *In re Rapier,* 143 U. S. 110, 133, 134, 12 Sup. Ct. 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; *Knowles v. United States,* 170 Fed. 409, 411, 95 C. C. A. 579; *United States v. Journal Co.* (D. C.), 197 Fed. 415, 418."

Appellant also attacks Section 1461, Title 18, United States Code as indefinite. This statute was considered by this court in *Magon v. United States,* 248 Fed. 201, cert. den. 249 U. S. 618. The court in the *Magon* case *(supra),* in discussing the problem of indefiniteness, says at page 203:

> "In construing the word 'obscene' as used therein, it has been uniformly held that if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury. *Rosen v. United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Knowles v. United States,* 170 Fed. 409, 95 C. C. A. 579; *United States v. Bennett,* 24 Fed. Cas. No. 14,571; *McFadden v. United States,* 165 Fed. 51, 91 C. C. A. 89; *Denollin v. United States,* 144 Fed. 363, 75 C. C. A. 365;

United States v. Musgrove (D. C.), 160 Fed. 700; *United States v. Harmon* (D. C.), 45 Fed. 414; *United States v. Clarke* (D. C.), 38 Fed. 732.

". . . A defendant charged with sending indecent matter through the mails is therefore, . . . in the same position that a defendant charged with sending obscene matter has always been in, and there is no more reason for holding the statute void as to the one than as to the other."

See also:

Verner v. United States (9th Cir.), 183 F. 2d 184.

The constitutionality of the statute here in question has also been discussed and upheld in such cases as the following: *Harmon v. United States,* 50 Fed. 921; *Rinker v. United States,* 151 Fed. 755; *Knowles v. United States,* 170 Fed. 409; *Coomer v. United States,* 213 Fed. 1. See also: *Besig v. United States,* 208 F. 2d 142.

The Verdict of the Jury Is Sustained by the Evidence.

Since appellant stipulated to the fact of mailing the books as charged in the Indictment, the sole question for the jury was whether or not the books were in fact obscene. *Rosen v. United States, supra; Burstein v. United States,* 178 F. 2d 665. On this question the books themselves were introduced into evidence.

The jury was given an opportunity to read and decide the question of obscenity under proper instructions by the trial court. This question of fact the jury decided against the appellant. A mere perusal of the books involved here would indicate the jury was correct in returning a verdict against the appellant.

See *Besig v. United States, supra.*

VI.
CONCLUSION.

There were no errors of law in the rulings of the trial court. Section 1461, Title 18, is constitutional. Therefore, it is respectfully submitted that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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No. 14,548

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLARD D. McKINNEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
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Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

No. 14,548

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLARD D. McKINNEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction of this appeal arises under Rule 37(a) of the Federal Rules of Criminal Procedure, Section 111, Title 18 United States Code, and Section 1291 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted for assault with a dangerous weapon in violation of Title 18 United States Code, Section 111 (R. 2, 3). On April 23, 1954 appellant, an Alcatraz prisoner, was produced in Court pursuant to a writ of habeas corpus ad prosequendum (R. 4).

On that day Mr. George Hammer was appointed as attorney for appellant (R. 4). Appellant stated prior to this appointment that he was without means to employ counsel (R. 4). After the appointment of Mr. Hammer appellant informed the Court that he desired to obtain an attorney of his own choice (R. 5). On July 14, 1954 appellant, represented by Mr. John Adams and Mr. George Hammer, plead not guilty (R. 6). On August 23, 1954 appellant waived trial by jury and was tried by the Court on that date (R. 7, 9). After the government's case had concluded, appellant moved to set aside the waiver of jury trial, which motion was ordered denied, and further moved for a continuance (R. 11). This motion was also denied (R. 11).

Appellant introduced evidence and testified in his own behalf (R. 11). Five witnesses testified for the defense on August 25, 1954 (R. 12). On August 26, 1954 appellant was found guilty by United States District Judge Michael J. Roche (R. 13). After being sentenced to a term of five years, appeal was then taken to this Court (R. 15-18).

SPECIFICATIONS OF ERROR.

Appellant specifies as "grounds of appeal" the following:

1. The appellant has been denied and deprived of his rights to the due process of law, in that he was deceived and coerced by his counsel into

waiving his right to a trial by jury without his having proper knowledge of said right.

2. That his counsel, appointed by the Court, acted in a disinterested and unethical manner in their conduct of his defense. That is, both counsel being learned in the law, did willfully neglect to perform their duties in conducting a reasonable and proper defense for the appellant, and by their refusal to interview many of appellant's witnesses, necessary to his defense.

3. Appellant has also been denied the right to present vital argument upon the validity of the indictment, charging him with violation of Section 111, Title 18 U.S.C., and that his counsel arbitrarily neglected to argue said vital point of law and the acts in support thereof.

QUESTION PRESENTED.

1. Was appellant deprived of the effective right of counsel?

ARGUMENT.

Appellant was without means to employ an attorney (R. 4). The Court appointed Mr. George Hammer to represent him. Appellant then informed the Court that he desired to obtain an attorney of his own choice (R. 5). The record shows that an additional attorney represented appellant during the remainder of

the case (R. 6-16). The record further shows that appellant took the stand and testified in his own behalf (R. 11). In addition, some five witnesses testified for the defense (R. 12). A waiver of jury trial, signed by both appellant and his counsel was filed.

Appellant filed a brief in this Court on January 21, 1955. In this brief he makes some reference to Section 2255 of Title 28 United States Code. No motion under this section was filed in the District Court. The brief is numbered with the Court of Appeals number for the appeal from the judgment of conviction. We will interpret the brief as referring to his appeal from that judgment of conviction.

Appellant makes a number of vague assertions to the effect that he was misled by his attorneys. The only facts which he alleges consist of the following:

1. That the attorneys refused to subpoena witnesses.

2. That they refused to interview *many* of them.

3. That his attorneys informed some of the witnesses they could not be subpoenaed because the warden would not approve of their testimony.

It should be immediately apparent that witnesses did in fact testify for appellant. It appears that John Revense, Frank Davenport, John Green, Henry White and Carl Sunstrund testified in appellant's behalf (R. 12). Nothing appears of record which would indicate that appellant's attorneys either refused to interview any witnesses or refused to sub-

poena any witnesses. The record only reveals that appellant had the services of two presumably competent members of the bar. No facts are even alleged by appellant as to which of the attorneys did the things which he claims, or what they said, or what the names are of the witnesses he mentions, or what they would testify to, or what he said to his attorneys with reference to their testimony. Even assuming everything appellant says is true (despite the absence of any such facts in the record), the only inference presented to this Court is that some persons known by appellant were not interviewed or subpoenaed to testify in his defense.

While it is true that appellant is entitled under the Sixth Amendment to the effective right of counsel (*Powell v. Alabama,* 287 U.S. 45; *Foster v. Illinois,* 332 U.S. 134), unless legal representation is of such a low caliber as to amount to no representation at all the trial is not vitiated. *Feeley v. Ragen,* 166 F. 2d 976; *Weber v. Ragen,* 176 F. 2d 579; *United States v. Hartenfeld,* 113 F. 2d 359.

The facts of the present case do not indicate any lack of the effective right to representation by counsel. Appellant's statements about witnesses amount merely, if they amount to anything, to dissatisfaction with counsel. Appellant claims he was misled into waiving his right to trial by jury. However, he does not state any facts whatsoever to support this conclusion. The only inference presented to the Court is that he feels he was misled because the case was lost. Appellant seems blinded to the fact that the reason

the case was lost might very well be that he was guilty instead of any supposed lack of representation by counsel.

No error is alleged by appellant in his brief in the conduct of the trial. His vague allegations of misconduct on the part of his counsel are refuted by the record. That record reveals that counsel defended him in a trial which lasted four days and that they called five witnesses in his behalf. In our opinion, the present case is merely an example of a properly convicted criminal who is attempting to misrepresent facts to the Court in order to escape his just punishment. Counsel for this appellant, without compensation, worked hard and ably in his behalf. Now that the result, foreordained by his guilt, has occurred, he turns and bites the hand which was extended to help him.

We respectfully request that the judgment of conviction be affirmed.

Dated, San Francisco, California,
February 9, 1955.

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